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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
PETITIONER,

v.

STEVE CONRAD, ET AL.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN ALLEY
Northgate Professional Building
Chattanooga, Tennessee

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Southeastern Promotions, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 30, 1973, and the judgment and opinion denying the petition for rehearing and suggestion of rehearing *en banc* entered on October 30, 1973.

Opinions Below

The opinion of the district court is reported at 341 F. Supp. 465 (E.D. Tenn. 1972) and appears in the appen-

dix at pages 28-55. The original opinion of the court of appeals and the opinion of the court denying rehearing are not yet officially reported. They appear in the appendix at pages 56 and 69, respectively.

Jurisdiction

The judgment of the court of appeals was entered on May 30, 1973. A timely petition for rehearing and suggestion of rehearing *en banc* was filed and was denied by the court on October 30, 1973. This petition for certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254.

Questions Presented

1. (a) In denying petitioner permission to produce HAIR in the Chattanooga Municipal Theater because of its contents did respondents violate the first and fourteenth amendments to the constitution of the United States by utilizing constitutionally impermissible criteria under an ordinance which was wholly lacking in criteria and which did not require respondents to seek judicial review?

(b) Is this decision in conflict with the decisions of the Fifth and Tenth Circuits in *Southeastern Promotions, Ltd.* v. *City of West Palm Beach*, 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.*, 459 F.2d 282 (10 Cir. 1972); see also *Southeastern Promotions, Ltd.* v. *City of Mobile, Ala.*, 457 F.2d 340 (5 Cir. 1972)?

2. Did the courts below apply impermissible criteria in concluding that HAIR was obscene?

3. Is HAIR obscene?

Constitutional Provisions Involved

The First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

The relevant facts are readily summarized below. It is, however, important that they be placed in a larger perspective. They are representative of an apparently unending series of attempts by local officials to prevent the showing of the rock-musical HAIR.

HAIR is a musical which deals with the life styles of many young people and their attitudes on the Vietnam war, racism, sex, drugs, pollution, etc. It has been produced in 140 American cities and in fourteen cities throughout the remainder of the world. HAIR is the most popular box office attraction in the history of American theatre (Tr. Vol. 3, p. 342). In the past few years, HAIR's road companies began to show in various smaller cities and towns throughout the southeastern and southwestern part of the United States. Frequently HAIR sought access to municipal facilities because in smaller communities they are the only or the best available places for performance. Despite the fact that these facilities have *without exception* routinely been made available for plays, municipal auditorium and theatre managers, supported by city officials, claim an unfettered right to determine which plays will be permitted to show and which will not. And time and time again HAIR's content — its "anti-establishment" views — collided with the different prepossessions of these municipal officials.

At plaintiff's[1] request federal district courts have issued injunctions against municipal officials on the ground that their assertion of unfettered censorial discretion is wholly inconsistent with the constitutional guarantee of free speech secured by the fourteenth amendment.[2] The few district courts which denied relief were reversed on appeal. *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.,* 459 F.2d 282 (10 Cir. 1972); see also *Southeastern Promotions, Ltd.* v. *City of Mobile, Ala.,* 457 F.2d 340 (5 Cir. 1972).

A. *Proceedings in the District Court*

This case began in "routine" fashion. Plaintiff was refused access to the municipal theatre (the "Tivoli Theater") and it brought an action in the appropriate district court. *Southeastern Promotions, Ltd.* v. *Conrad,* 341 F. Supp. 465. Like their counterparts elsewhere, these defendants asserted a series of paper-thin defenses which have been uniformly unsuccessful, and which were rejected in the court below. (341 F. Supp. at 468-71.) The heart of the defense, however, was the same claim unequivocally rejected by the Fifth and Tenth Circuits: defendants asserted, just as did the municipal officials in *Mobile, West Palm Beach* and *Oklahoma City,* that they had an essentially unfettered right to determine what plays would be exhibited and what would not. Defendants rejected the play as "not in the best interest of the community", and because it was not "clean, healthful and culturally uplifting" (p. 10, infra). The district judge, however, did not squarely focus on the standards used because *at the trial* defendants asserted for the first time that HAIR was obscene, and accordingly, they were under no obligation to permit its exhibition.

[1] For convenience, the parties are referred to by their designations in the district court. In this case plaintiff-appellant is the promoter of HAIR, that is, it has a contract arrangement with the New Hair Company, the owner of the play, to produce the play.

[2] Some of the district court cases are collected in *Southeastern Promotions, Ltd.* v. *City of Mobile,* 457 F.2d 340, 341 (5 Cir. 1972).

In a most unusual response, the judge empaneled an advisory jury which heard evidence and (without seeing the play) returned a verdict of obscenity (341 F. Supp. at 472). The judge agreed with this result. *Without seeing the play,* he made findings of fact and concluded that HAIR was obscene. (341 F. Supp. at 472-77) In so doing, the judge recognized that he had reached this conclusion despite the fact that the play had been performed in 140 cities throughout the United States and had been found by four other federal courts not to be obscene. (*Id.* at 474) The judge's ruling (*id.* at 475-76) rests entirely on his attempt to carve a play into speech and *two* levels of "conduct" — that which is "illustrative" of the speech and that which is not — and to treat the latter "conduct" as wholly beyond the protection of the free speech guarantee. Such an analysis is, so far as we can ascertain, wholly without basis in the decisions of any court.

B. *The Proceedings In The Court Of Appeals*

On appeal, the Sixth Circuit, over the dissent of Judge McCree, affirmed. Judge O'Sullivan and Judge Weick each wrote opinions for the majority. Judge O'Sullivan's opinion (pp. 56-64) simply adopts the reasoning of the district court, and then contains a holding that the speech itself is obscene (p. 62). *His opinion does not address a single argument raised by plaintiffs* nor does it contain a single citation in support of his holding. Judge Weick's concurring opinion describes HAIR — a play neither he nor

Judge O'Sullivan has ever seen — as one which "involves only depraved sexual action" (p. 65). Judge Weick so characterized a play which has been viewed by millions of theatre goers in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, Memphis and Nashville, not to mention citizens in virtually every major capital of the Western world as well as Tokyo, Sydney, and Tel Aviv. No other court has found the play obscene.

A petition for rehearing and suggestion of rehearing *en banc* were filed. On October 30, 1973, the suggestion for *en banc* consideration was denied, Judge Edwards and Judge McCree dissenting. (p. 69) The petition for rehearing was then denied by the original panel, Judge McCree again dissenting. (pp. 74-76) In his dissent, Judge Edwards wrote in part that:

"One of the "basic guidelines" recently reaffirmed by the Supreme Court in relation to the determination of a charge of obscenity is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, —— U.S. ——, —— (1973)....

"In this case the Municipal Auditorium Board of the City of Chattanooga has refused to rent the auditorium for the presentation of the play "Hair". A United States District Court has refused to grant relief from the board's decision on the ground that "Hair" is obscene. A panel of this court has affirmed the District Court, also holding that "Hair" is obscene. And the majority of our court has now rejected a motion to rehear the case in banc. All of this has been accomplished without any one of those participating in rejecting the play ever having seen it.[3] And at

[3] Judge McCree who did see the play dissented from the majority opinion characterizing it as obscene. (Footnote in opinion of Judge Edwards.)

no level has any board member or judge entered a finding that the play "lacks serious literary, artistic, political, or scientific value."

"While I would agree that at least some of the acts described so vividly in the opinions of the District Court . . . and of this court . . . could, if viewed separately, appropriately be labelled obscene under the present standards of the United States Supreme Court (see *Miller* v. *California, supra*. . . .) I do not agree that the play may be judged obscene, unless it is "taken as a whole" for purposes of that judgment. Thus far we have signally failed to do this. Taking words and sentences out of context, taking gestures employed in a play without reference to the rest of the play as has been done herein does not comply with the standard set out in *Miller, supra,* and *Roth, supra.*

"Over and above the first amendment violation described above the procedures employed to ban this play amounted to unconstitutional prior restraint on speech. . . . [citations omitted]

"Additionally the standards employed by the Municipal Auditorium Board in rejecting the application for rental at the theatre are clearly unconstitutionally vague.

"Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play "Hair" is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee — and this, we repeat, without any board member or judge so holding ever having seen the play. . . ."

Judge Weick wrote an opinion denying rehearing for himself and Judge O'Sullivan, and now took the ground that it was an appropriate exercise of judicial "discretion" to refuse equitable relief to an "obscene" play. (p. 70)

Reasons for Granting the Writ

This court has never addressed itself to the criteria for obscenity in the context of live theatre. The determination of obscenity below — made by judges none of whom had seen the play and in the teeth of record evidence that the play was a serious art work — rested upon criteria which, so far as we can see, are not supported by the decision of any court and are wholly inconsistent with first amendment principles. The issue presented is of great importance to American theatre, and it is one which only a few producers can afford the expense and long delay necessary to litigate all the way to this court.[4]

Moreover, the district court refused relief even though the municipal defendants did not even formally purport to apply *any* obscenity criteria in refusing to grant access to the play, but because it was not "clean, and healthful and culturally uplifting" — criteria which are wholly inconsistent with the standards laid down by this court. The case is, we think, on its face in conflict with the decisions of the *Fifth* and *Tenth Circuits*. And the whole history of the cases in this court on "prior restraint" make it plain that it is not proper to salvage an otherwise unconstitutional municipal licensing decision, as Judge Weick apparently believes, by an after-the-fact judicial determination that the speech involved (here the play) is, in fact, unprotected.

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[4] If the court permits the lower court decision to stand, it will, in effect, commit the general definition of obscenity in the context of live theatre to lower court determinations.

Point I. Defendants' Action Is Plainly Unconstitutional Because of a Lack of Constitutionally Acceptable Standards Governing Use of the Auditorium.

A. *No Acceptable Standards*

The courts below were fundamentally in error in viewing this as an obscenity case. This case is no different from those decided by the Fifth and Tenth Circuits in *Mobile, West Palm Beach* and *Oklahoma City, supra*. Here, as in those cases, access to the municipal theatre was refused under a municipal code wholly lacking in standards. Here, as in those cases, municipal officials claimed and *exercised* unfettered discretion over what plays would be permitted. Defendants' action is, therefore, invalid on its face. This case is squarely controlled by *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 n.3, and the long line of cases there cited. Under the constitution of the United States:

> "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community." (*Id.* at 157)

See also *Cox* v. *Louisiana*, 379 U.S. 536, 557. Accordingly, "in numerous . . . cases, [the Supreme Court has] condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 n.22; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99-101.

The constitutional requirement of "narrow, objective and definite standards" is, quite plainly, not met here. Here, as in ***Mobile, West Palm Beach*** and ***Oklahoma City,***

there are no standards whatever by which to guide the discretion of the theatre officials. Section 2-238 of the Code of the City of Chattanooga, which controls use of the theatre, does not purport to prescribe any standards (Tr. Vol. p. 25; Vol. 2, pp. 14-15), and accordingly, the district judge rightly made no reference to it. The commissioner of utilities, grounds and buildings expressly testified that HAIR was denied access because, "in the best interest of the community," the city permitted only productions which are "clean and healthful and culturally uplifting." (Tr. Vol. 1, p. 26) Moreover, counsel for defendants repeatedly stressed the unfettered rights of defendants, stemming, he believed, from the "proprietary" character of these defendants' conduct. (Tr. Vol. 4, pp. 430-432, 434-439) In passing on the plaintiffs' application, defendants (a) did not see the play, (b) made no effort to apply obscenity criteria, and (c) *they never in fact considered whether HAIR was* obscene.[5] Their only judgment

[5] Defendants made no effort to apply obscenity criteria. *They had not seen the play when booking was refused* (Tr. Vol. 1, p. 27, Vol. 3, p. 235), *and they refused HAIR on very general grounds* (Tr. Vol. 2, pp. 161-162):

> "Mr. Conrad testified: It was brought to the attention of the Board. The Board, I mentioned—that a promoter was interested in bringing it here to Chattanooga. I don't remember the exact wording. I may have suggested something to the effect, 'Is there anyone who feels that it should be brought here?' There was no response and I talked by long distance telephone to the promoter and that was the last we heard from that particular promoter.
>
> • • •
>
> A formal vote was then taken not—to deny the booking. I believe the words used—the nudity was discussed briefly. *It was not an in depth discussion if I recall. The nudity was discussed briefly. The language was discussed briefly. It was determined that the booking would not be made in the best interest of the public.*
>
> Q. As a matter of fact, your obscenity defense was filed Friday the day before you went?
>
> I had no knowledge of what the defense was. I mean, I hadn't conferred with the attorneys, I didn't know."

was that it was not "in the best interest of the public." The cases cited show that this criterion is constitutionally insufficient.[6]

The judge in the district court and the court of appeals on rehearing apparently thought that these decisions were inapplicable and equitable relief should be denied, because exhibition of HAIR would violate Tennessee statutes and municipal ordinances relating to indecent exposure, lewdness, public nudity, and obscenity. (341 F. Supp. at 471) But nothing in the state statutes or in the auditorium code purports in any way to restrict the discretion of the municipal officials to questions of obscenity. "It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute." *Gooding* v. *Wilson*, 405 U.S. 518, 520. Here the *articulated and applied* "standards" were constitutionally impermissible ones, such as "clean, healthful and culturally unlifting."

[6] Under *Shuttlesworth* and *Niemotko* v. *Maryland*, 340 U.S. 268, we think it doubtful that, where free speech interests are at stake, the auditorium manager can supply otherwise absent standards *ex post facto*. Here, as in *Shuttlesworth*, defendants *in fact* operated in a free-wheeling manner in accordance with the apparently open-ended discretion conferred upon them. Accordingly, their conduct was unconstitutional. (394 U.S. at 154-159) In any event, we know of no decision which would remotely sanction such an open-ended standard *even if it were an expressed part of the municipal code*. It has no more precision than "*family entertainment*," which the Fifth Circuit found wanting. *City of West Palm Beach, supra*. "Clean, healthful and culturally uplifting" entertainment is the equivalent of "the public welfare, peace, safety, health, decency, good order, morals or convenience," a standard invalidated in *Shuttlesworth*. It is also the equivalent of "prejudice to the best interests of the people of said City," a standard invalidated in *Gelling* v. *Texas*, 343 U.S. 960, and "moral, educational or amusing and harmless" which was condemned in *Superior Films, Inc.* v. *Department of Education*, 346 U.S. 587. For additional illustrations see *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682-83. See also *Coates* v. *Cincinnati*, 402 U.S. 611, 614.

Moreover, the holding below wholly disregards *Shuttlesworth* and its progeny because it completely ignores the distinction there emphasized between prior restraint and subsequent punishment. It may very well be that exhibition of a movie or play could give rise to a subsequent prosecution under an obscenity statute. It does not follow, however, that *absent narrowly drawn standards* municipal licensing officials can impose restraint *prior* to exhibition. This settled distinction between prior restraint and subsequent punishment lies at the heart of the cases recognizing that an ordinance invalid on its face may be disregarded (see *Shuttlesworth, supra,* 394 U.S. at 151) and it was reaffirmed by the Court in *United States* v. *New York Times, Inc.*, 403 U.S. 711, and *Healy* v. *James,* 408 U.S. 169, 184. Accordingly, as the Fifth Circuit expressly recognized in *City of West Palm Beach,*[7] 457 F.2d at 1021, whether or not HAIR could be the subject of a criminal prosecution has no bearing on the validity of defendants' unlawful prior restraint on its exhibition. See also *Gooding* v. *Wilson,* 405 U.S. 518, 520-21. To assert, as does Judge Weick, that this unconstitutional conduct can be salvaged by a subsequent judicial determination that the particular speech involved is unprotected is not supported by a single decision of this court, and it is wholly at variance with sound first amendment considerations. At least since *Near* v. *Minnesota,* 283 U.S. 697, it is plain that plaintiffs need not prove the protected character of their speech as a condition precedent to invoking the rules laid down by this

[7] "Moreover, we hasten to add that the factual situation in the instant case is much more offensive in a constitutional sense than the circumstances in *Shuttlesworth*. There the petitioner was punished under the terms of an unconstitutional ordinance *after* exercising his right of free speech. In the instant case, the discretion of the defendant Boyes operated as a prior restraint upon the plaintiff's freedom of speech." (457 F.2d at 1021) (Emphasis in original.)

court governing prior restraint. Indeed, any such requirement would virtually rob those rules of any meaning.

B. *No Provision For Judicial Review.*

The district judge failed to recognize that defendants' refusal to permit HAIR access to the municipal auditorium was also invalid under *Freedman* v. *Maryland,* 380 U.S. 51, 58, where the Court recognized that only a procedure requiring a judicial determination suffices to impose a valid final restraint. And of critical importance here is the burden of seeking judicial review is on the city officials and a statute not so providing is void. (380 U.S. at 58-60) See also *Heller* v. *New York,* 413 U.S. ——, ——, n.5 and related text.

These decisions are controlling here. Here, as in *Freedman,* defendants pass upon the content of speech in order to determine whether it shall be permitted to exhibit; and here, as in *Freedman* defendants are acting under the provisions of municipal law which do not require that *they* seek judicial review. Accordingly, to that extent the city code, and defendants' action taken thereunder, is under *Freedman* void on its face.

Freedman is not inapplicable, as defendants contend, because HAIR might be shown in private theaters. *Freedman* is explicit recognition of the fact that "where First Amendment rights are involved — questions relating to the structure and timing of [judicial] remedies have been thought crucial to substantive constitutional policies". Hart & Wechsler, *The Federal Court and the Federal System* (2 ed.) 367, a point elsewhere discussed at length by one of counsel. Monaghan, *First Amendment "Due Process",* 83 Harv. L. Rev. 519, 524-26. Here the municipal licensing officials made a decision on grounds of a play's content; whether the result is a *final* bar to exhibition in

all available places in the municipality or only in some (municipal buildings) is irrelevant to the policies of *Freedman* — even if one were to overlook the obvious "in terrorem" effect of such a municipal decision on private theatre owners in small communities.

POINT II. THE COURTS ERRED IN CONCLUDING THAT "HAIR" WAS OBSCENE.

As the judge saw the matter, the heart of the case turned on whether HAIR was obscene. He empaneled an advisory jury and held an evidentiary hearing. The jury returned a verdict of obscenity (341 F. Supp. at 472). Not only did the jury not see the play, but the question of obscenity was submitted to it in an indiscriminate manner.[8]

It is unclear what weight the judge attached to the jury's verdict. That he could not lawfully attach to it any controlling significance is clear beyond doubt. A judge must make his own *independent determination* whether challenged material is protected by the constitution of the United States. E.g., *Miller* v. *California*, 93 S. Ct. 2607, 2615.[9] The judge recognized this fact; after reciting the findings of the jury he proceeded to make extensive findings of his own

[8] Obscenity cases, *Miller* v. *California*, 413 U.S. ——, present a series of discrete inquiries: whether the materials (a) appeal to prurient interests; (b) are patently offensive; (c) are without serious redeeming social value; and (d) whether there is any evidence of pandering. It is, surely, one thing to submit the question of contemporary local community standards to a jury, quite another to submit the question of social value. *United States* v. *A Motion Picture Entitled "I Am Curious Yellow,"* 404 F.2d 196, 199-200 (2 Cir. 1968). See Monaghan, *supra*, 83 Harv. L. Rev. at 530-31.

[9] This is part of the larger principle that where free speech claims are at stake the court must make its own independent determination. *New York Times* v. *Sullivan*, 376 U.S. 255, 284-85.

(341 F. Supp. at 472-74).[10] In finding HAIR obscene, however, we think it apparent that he committed reversible error in several separate respects.

A. *The Judge Erred In Ruling That HAIR Was Obscene Without Seeing The Play.*

In this case the judge ruled that the play was obscene without even viewing it and despite the fact that there was substantial evidence in the record of the play's protected character. This was plain error.

As defendants recognized (Tr. Vol. 2, p. 5; see *Blount* v. *Rizzi*, 400 U.S. 410, 417; *Healy* v. *James*, 408 U.S. 169, 184) the burden of proof is on those who would censor. And the cases are uniform in recognizing that a judge ought not lightly to disregard the evidence of nonobscenity. E.g., *Attorney General* v. *A Book Named "Naked Lunch"*, 351 Mass. 298, 299 (1966) ["although we are not bound by the opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community"]. *United States* v. *Klaw*, 350 F.2d 155, 170 ["It is the record and not our feelings that must control"]. Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L. J. 127, 150-151 and note 115. There was substantial record evidence demonstrating that HAIR is a serious art work

[10] We would observe, however, the judge's use of an advisory jury raises acute questions of practice so far as protection of free speech interests are concerned. Since the jury is necessarily a barometer of community values, it is by no means clear the jury will accord much protection to ideas which are unpopular with majority sentiment. Monaghan, *First Amendment "Due Process"*, supra 83 Harv. L. Rev. at 528-29. Accordingly, it is to judges —not juries— that the principal defense of free speech interests falls—a fact reflected in the requirement that the judge must make his own determination as to whether materials are constitutionally protected.

— to say nothing of the patently weak testimony that the play is obscene. Here the judge disregarded that evidence *without even seeing the play*, and without a finding that it was impractical to do so.[11] We know of no decision which would justify a judge in disregarding *favorable* record testimony to find *on the merits* against a serious theatrical work which has won substantial acclaim when the judge has not even viewed the play.[12] This is, after all, not a case where the judge disregards record evidence because the materials at issue are "hard core pornography [which] can and does speak for itself". *Paris Adult Theatre I* v. *Slaton*, 93 S. Ct. 2628, 2634 n.6; *Kaplan* v. *California*, 93 S. Ct. 2680, 2685 (semble). See also *United States* v. *12 200 Ft. Reels of Super 8MM Film*, 93 S. Ct. 2665, 2670 n.7.

[11] The alternatives which do least damage to the free speech interest must, of course, be utilized where reasonably available. E.g., *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 101 n.8 (collecting cases). If it were not practicable to see the play, a separate issue would, of course, be presented, but here there is no such showing of impracticability. (In *Southeastern Promotions, Ltd.* v. *Cervantes*, No. 26463-F, a state court judge in St. Louis flew to Kansas City to see a production of the play and after so doing ruled in its favor.) Indeed, the municipal officials flew to see the play immediately before trial.

[12] The necessity for viewing the play, at least absent the showing that such procedure is not practically available, is not obviated by the judge's footnote (341 F. Supp. at 474 n.4) that the play is "substantially modified from time to time and place to place". If that is so, it is difficult to comprehend what in this record supports *any* of the judge's findings since all the oral testimony was based on exhibition of the play elsewhere. Moreover, we are not told how HAIR "changes" in any way *material* to the issue before the judge. Surely, the fact that there is considerable "action" in the play does not mean that there is any material change in detail. Like any play, HAIR has an integrated theme and any changes from performance to performance, if they exist at all, are simply in its nuances. That the judge felt able to make findings about the "obscene conduct" in HAIR is a recognition of this fact. Finally, the judge's finding of "changes" is contrary to the *express stipulation between the parties*. (Tr. Vol. 2, pp. 12-13). Not surprisingly, neither the respondents nor the court of appeals made mention of this below.

B. *The Courts Below Applied An Incorrect Standard To Evaluate The Play.*

In finding HAIR obscene the judge recognized that he was reaching a result contrary to every other federal court which has considered the matter about a play which has shown in over 140 cities (Tr. Vol. 2, p. 12 *supra*), and which is one of the most successful and widely acclaimed theatre productions in modern times. The judge reached the conclusion he did because he fundamentally misunderstood the controlling constitutional standards. The judge made detailed findings concerning HAIR's "street language", but he recognized (341 F. Supp. at 475) that this was not decisive under the decisions of this court (*Cohen* v. *California*, 403 U.S. 15; *Gooding* v. *Wilson*, 405 U.S. 518), and here the language "considering [its] content and its placement", at the minimum, "bears some of the earmarks of an attempt at serious art". *Kois* v. *Wisconsin*, 408 U.S. 229, 231. Similarly, the judge recognized, as he must, that the brief nude scene was not the equivalent of obscenity. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 515. The crucial part of the judge's ruling, silently approved by the court of appeals, follows:

> "Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. *It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment.* These matters were dealt with by

the United States Supreme Court in the case of *United States* v. *O'Brien*, 391 U.S. 367. . . .

"*It is further clear to this Court that conduct not within the First Amendment is not subject to the requirement that the production in which it takes place be judged as a whole,* but rather that the conduct may be judged obscene or nonobscene on the basis of individual acts of conduct. It is abundantly clear that if a crime other than the crime of obscenity were committed upon the stage, the actor committing that crime could neither claim First Amendment protection nor could he require that he be judged criminal or noncriminal on the basis of the production as a whole. . . . *Accordingly, it must be that when the crime of obscenity is committed upon the live stage by conduct and not by speech,* or symbolic speech, no First Amendment protection attaches to that conduct *and no First Amendment requirement attaches that requires the production as a whole to be reviewed in determining such criminal obscenity.*

"This Court is aware that a district judge dealt differently with this issue in the case of *Southeastern Promotions, Ltd.* v. *City of Atlanta,* D.C., 334 F.Supp. 634 (1971) cited above. The Court there held that a stage production cannot be dissected into speech and nonspeech components. . . . It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the theatrical. This Court respectfully declines to follow the rule set forth by the district judge in the *Atlanta* case. The same fallacy attaches to each of the cases relied upon by the plaintiff in prior adjudications of the theatrical production "Hair."

"When viewed in their component parts, it is perfectly clear that the actors and actresses in the theatrical production "Hair," by their conduct, and apart from any element of speech, commit repeated acts of criminal obscenity. . . . The Municipal Auditorium is a public place and the committing of live acts of simulated sexual intercourse, masturbation and mixed group nudity upon the stage before a live audience appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards, both state and national, relating to the representation of sexual matters, and it is utterly without redeeming social value." (341 F. Supp. at 475-76) (Emphasis supplied.)

We recognize that states "have greater power to regulate nonverbal, physical conduct than to suppress descriptions of the same behavior." *Miller* v. *California,* 93 S. Ct. 2607, 2616 n.8. But each media of communication presents its own problems,[13] and the criteria used below would eliminate from live theatre virtually every sexually oriented scene no matter how presented and how central to the plot. By the criteria below many of the Greek classics (e.g., Lysistrata) could not be shown.

The judge's distinction is a complex one: first, the judge would artificially divide any play — a unitary presentation — into its constituent words and conduct; and secondly, he would further divide "conduct" into that which is "illustrative" of the speech and that which is not — the latter then being as wholly beyond the first amendment. Fundamentally, this approach is a total misapprehension of what live theatre is all about. And since sex is one of the most pervasive themes in all art, one can expect that a good part of theatre will, under his ruling,

[13] *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 689-90; *Kaplan* v. *California,* 83 S. Ct. 2680.

be beyond the protection of the first amendment — a result which, of course, would place live theatre productions in a category wholly different from the criteria applied to motion pictures. Certainly, if motion picture theatre productions are constitutionally entitled to the protection of obscenity standards, *Kaplan* v. *California*, 93 S. Ct. 2680, 2684, no sufficiently principled justification can be advanced for holding these standards *wholly inapplicable* to a live theatre performance *of the same matter*!

The root difficulty in the judge's opinion is his reliance upon an over-simplified distinction between "speech" and "conduct", an oversimplification which has been criticized by every commentator who has considered the subject.[14] More importantly, it finds absolutely no support in the decisions of this court. Those cases, of which *California* v. *LaRue*, 409 U.S. 109,[15] is only a recent example, recognize that every aspect of speech involves some integrally related conduct, which has necessarily been treated as a part of that speech.[16]

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[14] E.g., Henkin, *On Drawing Lines*, 82 Harv. L. Rev. 63, 80: "If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is speech." See also Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1; *Symbolic Conduct*, 68 Col. L. Rev. 1091.

[15] See also *City of Kenosha* v. *Bruno*, *supra*, p. 17.

[16] Thus the *conduct* of wearing arm bands is protected, *Tinker* v. *Des Moines School District*, 393 U.S. 503. So too is the *conduct* of distributing leaflets protected by the first amendment. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419. Similarly, picketing and demonstrations, while they involve speech "plus" conduct are entitled to considerable protection under the first amendment. *Amalgamated Food Employees Union* v. *Logan*, 391 U.S. 308; *Gregory* v. *Chicago*, 394 U.S. 111; and *Brown* v. *Louisiana*, 383 U.S. 131. In essence this is because it has always been understood that some conduct is an integral part of the speech itself, and the communication cannot exist without. The unworkability of any simple distinction between speech and conduct was recognized in numerous opinions of this Court during the last term. Thus in *Grayned* v. *Rockford*, 408 U.S. 104, and *Chicago Police Department* v. *Mosley*, 408 U.S. 92, the Court again recognized that picketing is within the protection of the first amendment, and both opinions referred to picketing as "expressive conduct". In *Kleindienst* v. *Mandel*, 408 U.S. 753, 764, the Court specifically rejected an attempt to resolve a first amendment issue in terms of an "action-speech" dichotomy saying "we cannot realistically say that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement." In *Healy* v. *James*, 407 U.S. 169, 181, the Court once more observed that "speech" includes more than "speaking" again recognizing that the right embraces freedom of association even though "the freedom of association is not explicitly set out ...." We would also invite the court's attention to *Wisconsin* v. *Yoder*, 406 U.S. 205, the Amish School case, where the Court refused to analyze a freedom of religion claim in terms of a distinction between beliefs and "conduct."

These decisions make plain that first amendment freedoms are not to be denied by artificially breaking up essentially unitary forms of communication. Each form of communication is to be treated for what it is, not artificially carved into "speech" and "something else". "Speech" in the constitutional sense includes a range of integrally related activities, such as leafleting, operating broadcasting facilities, associating for speech purposes, demonstrating, picketing, etc. These activities are *within* the ambit of free speech, and can be curtailed only if standard first amendment requirements are satisfied; namely, a narrowly drawn restriction designed to vindicate compelling governmental interests. That is the plain relevance of the foregoing cases, of *United States* v. *O'Brien*, on which the district judge relied, and of the obscenity decisions of this Court in the last term.

We think it apparent then that the judge's attempt to draw an artificial distinction between speech and conduct is wholly without support in either reason or authority. In live theatre—a form of communication which antedates the first amendment by thousands of years—there is an

inseparable union of words and action, which *together* have served as a vehicle for conveying ideas. This union has never been understood to be "mainly conduct and little speech." *Cohen* v. *California*, 403 U.S. 15, 27 (dissenting opinion). To the contrary, it has always had "a recognizable communicative aspect [which is] beyond dispute." *Cowgill* v. *California*, 396 U.S. 371 (memorandum of Harlan, J.). And, as Judge Edenfield observed, "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Productions, Ltd.* v. *Atlanta*, 334 F. Supp. 634, 639. That live theatre involves an inseparable union of words and action was clearly understood 2,300 years ago by Aristotle in his influential *Poetics*, see Book 1, Ch. 6, and a contrary view would certainly startle those involved with that art form. E.g. Shank, *The Art of Dramatic Art* (Delta 1969), particularly ch. 4; *The Theory of the Modern Stage*, E. Bentley, ed., (Pelican 1968).[17]

Not only is the artificial separation of HAIR into speech and conduct of the judge below inconsistent with both reason and authority, it is entirely unworkable. We are invited to divide a play not simply into speech and conduct, but conduct which is "illustrative of speech" and that which is not. The result which this mode of analysis produced shows its unworkable and unsatisfactory character. Without seeing the play, the judge found that the "conduct" in HAIR obscene because not "illustrative of the

[17] The judge was, therefore, plainly wrong. There is no doubt that the state has legitimate interest in regulating what occurs in the theatre. Murder is murder whether committed in a theatre. That is a necessary accommodation of the first amendment with other competing claims. Where, however, the state's only interest is in regulating sexual morality, then the accommodation is, as every other court has recognized, the satisfaction of obscenity criteria.

speech" because, he said, the simulated sexual conduct was "unrelated to" (p. 40) or "without reference to (p. 41) the *dialogue.*" (*Id.* at 474) That conclusion, incredible on its face and wholly without any acceptable basis in this record, is most revealing: the judge does not find that the simulated sexual conduct is not relevant to the *play*, simply to the *dialogle*. It seems apparent to us that the judge assumes that the play and the dialogue are one thereby missing the whole idea of what live theatre is all about.[18]

Moreover, even if the conduct were "unrelated" to the play, why was that conduct "obscene?" The fact that there is a brief nude scene at the end of the first act is certainly not enough, as the judge apparently recognized. The judge seemed rather to have focused on "simulated sexual conduct." (*Id.* at 474) Emphasis should be placed upon *simulated*. The judge does not find that there was any actual masturbation, sodomy or oral copulation; he finds simply that it was "simulated". One wonders how many plays could survive if simulated sexual activity is enough to withdraw protection of first amendment. The judge, of course, simply assumed that the standards of the street are applicable to the theatre. But a "reviewing court must, of necessity, look at the context of these materials, as well as their content." *Kois* v. *Wisconsin*, 408 U.S. 229, 231. And

> "'Acts which are unlawful in a different context, circumstances, or place, may be depicted or incorporated in a stage or screen presentation and come with-

[18] His view stands in sharp contrast to the recent decision in *Kois* v. *Wisconsin*, 408 U.S. 229, 231, where nude pictures in a newspaper were held protected "because they are relevant to the theme of the article."

in the protection of the First Amendment, losing that protection only if found to be obscene.' " (Id. at 830)

Barrows v. *Municipal Court*, 1 Cal. 3rd 821, 830. See also *P.B.I.C.* v. *Byrne, supra*, 313 F.Supp. at 764-65. This court's most recent pronouncement, *California* v. *LaRue*, 409 U.S. 109, 116-118, expressly recognizes that fact in holding that conduct in a public barroom is not to be equated with "conduct" occurring in a theatre. And surely *Barrows* is inconsistent with Judge O'Sullivan's assumption that HAIR's speech alone is obscene.

C. *HAIR Is Not Obscene.*

Defendants rightly recognized (Tr. Vol. 2, p. 5) that the burden of proof on obscenity rested with them. *Blount* v. *Rizzi*, 400 U.S. 410, 417; *Healy* v. *James*, 408 U.S. 169, 184. We need not discuss the evidence at considerable length because *on defendants' evidence alone*, the judge should have held that, as a matter of law, there was no sufficient showing that HAIR was obscene. It would unduly burden this petition to review the evidence at length. Suffice it to say that Defendants' evidence consisted of four witnesses. Typical is that Mr. William Trasher (Tr. Vol. 3, p. 164) a Chattanooga attorney. He had seen the play 1 1/2 years before and had walked out at the end of the first act. (Indeed, he was unsure as to how many acts the play had Tr. 172). He too readily admitted his lack of knowledge about the theatre: "I could tell you about baseball and football but I don't know much about the theatre" (*Id.* 189). His reason for leaving the theatre is simply stated at page 186. He was revolted by the "blasphemy and sacrilege" of the play, its "desecration of the American flag" and its "belittlement of the United States government" which means, of course, that he understood and rejected what he perceived to be HAIR's message.

Evidence of this slender nature, plus the script of the play itself, constituted the defendants' case on obscenity. It can hardly constitute a sufficient basis for concluding that a theater performance which has played in over 140 cities in the United States and has been widely acclaimed, can be suppressed *in Chattanooga*? All that is involved here is the testimony of witnesses who have not the slightest basis for giving "expert" opinion on the material issues. Moreover, each of defendants' witnesses grudgingly conceded that the play had a message. Not one of defendant's witnesses testified, or could testify, with respect to what are contemporary community standards (national or local) as to what is acceptable for live theatre.

It would reduce the first amendment to a nullity if defendants' testimony were adequate to support the finding that the play was obscene. All that is shown here is opposition to HAIR and what it stands for. But access to a municipal auditorium "may not be refused because it is not the type of entertainment which appeals to the auditorium board." *City of Mobile, supra*, 457 F.2d at 341. It is in fact, outrageous in the extreme to think that American citizens in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, *Memphis and Nashville*, not to mention citizens in virtually every major capital of the Western world as well as Tokyo, Sydney, and Tel Aviv can see this important play but that these defendants can decide that the citizens in Chattanooga and its surrounding area cannot see it in a municipal auditorium. Plaintiff submits that the constitution of the United States prohibits such gross censorship; it prohibits this effort to reduce the residents of Chattanooga to the status of second class citizenship.

Wholly apart from the affirmative evidence in support

of HAIR,[19] therefore, it is plain that there is no acceptable basis for the judge's finding.

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[19] There was substantial evidence in the record that HAIR satisfied none, let alone all, of the elements which must be present if a finding of obscenity is to be substained.

Specifically:

1. *Appeal to Prurient Interest.*

The dominant theme of HAIR, taken as a whole, does not appeal to a prurient sexual interest. The "dominant theme" of HAIR is not sex, nudity, or anything of that nature. HAIR is concerned with the world of the alienated young—with Vietnam, drugs, love, etc. (Tr. Vol. 3, pp. 282-98; id. at 311; id. at 321-23, the nude scene is plainly not designed to "appeal to a shameful or morbid interest in nudity, sex. etc." *Roth* v. *United States*, 354 U.S. 476, 478 n.20; *Cohen* v. *California*, 403 U.S. 15, 20. Its purpose is symbolic, not erotic. (Tr. Vol. 3, p. 321.)

2. *Patent Offensiveness.*

HAIR is not "patently offensive"; it does not "affront contemporary community standards relating to the description or representation of sexual matters in the live theatre." (Tr. Vol. 3, p. 3423) The use of four letter words can hardly be thought to deprive the speech of its protected character, as the judge recognized. See p. 17, *supra*. (See Tr. Vol. 3, p. 325) Moreover, these very words are used in the phonograph album which has sold almost countless copies in every city and town throughout this country. In addition, HAIR has been playing in innumerable other American and 14 foreign cities, a fact not to be ignored in determining whether it is patently offensive for what is appropriate live theatre.

3. *Social Value.*

Defendants could not rationally allege that HAIR is "without serious redeeming social value". *Miller* v. *California*, 93 S. Ct. 26-7, 2616. The widespread critical acclaim received by HAIR throughout the country demonstrates that it has redeeming social value. In *Southwest Productions, Inc.* v. *Freeman*, (D. Ark. 1970 unreported) at page 7, Judge Eisel characterized the matter as follows:

> "The principal characters in the production are definitely not the 'straight' world. Rather they are a collection of the disenchanted, the dropouts from conventional society: the young, the poor and the black, experimenting with new life styles, and yet still trying to confront established society on what they believe to be the 'real' issues: war, poverty, racism and the hypocrisy of their elders. Their language is from the street and of their generation. Whether what is said has any merit or validity or, indeed, whether it is said well is irrelevant for our purposes. That the play, taken as a whole, does make statements relating to important social, moral and political issues is, however most relevant under the tests mandated by the decisions of our courts."

There was ample testimony in this record to support Judge Eisel's conclusion. (Tr. Vol. 3, pp. 282-98; 321-23; 342, 348-5) Even the defense witness conceded this fact.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

JOHN ALLEY
Northgate Professional Building
Chattanooga, Tennessee

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts

APPENDIX "A"

UNITED STATES DISTRICT COURT,
E.D. TENNESSEE, S.D.

Civ. A. No. 6379.

SOUTHEASTERN PROMOTIONS, INC.
v.
STEVE CONRAD et al.

April 7, 1972.

John Alley and Michael M. Raulston, Chattanooga, Tenn., for plaintiff.

Eugene Collins and Randall L. Nelson, Chattanooga, Tenn., for defendants.

MEMORANDUM

FRANK W. WILSON, Chief Judge.

The plaintiff, Southeastern Promotions, Inc., seeks by this action to obtain a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 regarding the plaintiff's right to lease a municipal theater or auditorium for use in presenting a commercial theatrical production known as "Hair." Jurisdiction is averred to be based upon 28 U.S.C. §§ 1332 and 1343(3) (4). The plaintiff seeks by way of relief a mandatory injunction requiring the defendants, as members of the Municipal Auditorium Board for the City of Chattanooga, Tennessee, to lease the theater or auditorium under its management to plaintiff for a specific date, the specific date now sought being Sunday, April 9, 1972, four days from the date upon which the trial in the case was concluded.

By way of response the defendants filed a motion seeking a dismissal of the complaint upon the grounds that (1) the

plaintiff was without standing to maintain the lawsuit, (2) the defendants, acting in a proprietary rather than governmental capacity, cannot be required to lease the theater facility under their management, (3) the theatrical production sought to be presented by the plaintiff would violate both the ordinances of the City of Chattanooga and the laws of the State of Tennessee and would be in violation of Paragraph (1) of the standard lease requiring compliance with such laws (Exhibit No. 3), (4) the plaintiff, being a corporation and not a natural person, would have no right to maintain this action, and (5) the complaint fails to allege a cause of action.

In order to expedite the hearing of this case, action on the motion to dismiss was reserved and the defendants were ordered to file an answer. In their answer, and among other matters, the defendants contended that the theatrical production "Hair" was a violation of municipal ordinances and state laws prohibiting nudity and obscenity in public places. A trial was held upon all issues, with the issue of obscenity being tried to an advisory jury pursuant to Rule 39 (c), Federal Rules of Civil Procedure. The jury returned a verdict finding the theatrical production "Hair" obscene within the meaning of obscenity as that term relates to freedom of speech as secured by the First Amendment and further found conduct on the part of actors apart from any speech or conduct in expression of speech (symbolic speech) to be obscene conduct.

The case is now before the Court for decision of all issues raised in the plaintiff's complaint, the defendants' motion to dismiss, the defendants' answer, the record made upon the trial of the case, the advisory verdict of the jury, and the argument of counsel. By order of the Court and without objection of the parties, the trial of this case was held shortly after the filing of the answer and this memorandum is being written immediately upon the conclusion

of the trial and under the necessity of its immediate entry if the plaintiff is to have the requested date of showing four days from this date. This opinion will serve as the Court's findings of fact and conclusions of law.

The plaintiff, Southeastern Promotions, Inc., is a corporation organized under the laws of the State of New York and with its principal offices in New York City. It is engaged in the business of presenting commercial theatrical productions and has contractual relations giving its presentation rights with the theatrical group that owns and produces a theatrical production known as "Hair" and described as a "rock musical." The defendants are the duly appointed and acting members of a municipally created body known as the Board of Directors of the Memorial Auditorium. They were appointed pursuant to an ordinance of the City of Chattanooga, Tennessee, and are charged with the management and operation of the Memorial Auditorium, a municipally owned auditorium, and the Tivoli Theater, a former motion picture theater privately owned and now under lease to the City of Chattanooga.

The plaintiff has made three previous requests of the defendants for lease of the Tivoli Theater but upon each occasion the request was denied. Following the last denial this lawsuit was filed upon November 1, 1971. A hearing upon a preliminary injunction in advance of any response by the defendants was held at that time and the injunction denied. By amendment to its complaint filed March 23, 1972, the plaintiff now seeks a mandatory injunction permitting it to lease the municipal auditorium for the presenting of its theatrical production "Hair" upon the date of Sunday, April 9, 1972. No issue exists in the case but that the municipal auditorium is not scheduled for other use on that date or that he plaintiff cannot meet the conditions of the standard lease form regularly used by the defendants in leasing of that municipal auditorium

other than that condition of the lease relating to compliance with the laws of the State of Tennessee and of the City of Chattanooga.

Motion to Dismiss

Turning first to the defendants' motion to dismiss, as previously stated, that motion is predicated upon a denial of standing on the part of the plaintiff corporation to maintain this action, a denial of any duty upon the defendants while acting in a proprietary capacity to lease the municipal facilities under its management, an averment of the plaintiff's inability to comply with the lease requirement that local and state law will not be violated, an averment that the plaintiff, being a corporation and not a natural person, would have no right to maintain this action, and a general averment that the complaint fails to aver any substantial federal question or constitutional issue.

[1] With regard to the plaintiff's standing to maintain this litigation, it is the defendants' contention that the plaintiff does not propose to make any expression or theatrical presentation itself, but rather is only a booking agent having at most only a commercial interest in the presentation of "Hair." It is contended that no right of the plaintiff to freedom of speech is involved. Citing the rule that only those whose federal constitutional rights are alleged to be involved have standing to seek judicial adjudication of those rights, the defendants deny any standing in the plaintiff to assert a First Amendment violation in this lawsuit. While the undisputed evidence now bears out that the plaintiff's interest in the lawsuit is a commercial one as booking agent and promoter, and not as an owner or performer, the testimony being that it expects to net $10,000 off of a single performance in Chattanooga, the issue of standing to sue would appear to be resolved in favor of the plaintiff by the United States Supreme Court in the case of *Flast* v. *Cohen*, 392 U.S. 83,

88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) wherein the Court stated:

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions' (citation omitted)."

As stated elsewhere in that opinion, "The question of standing (i.e., in terms of constitutional limitation) is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in form historically viewed as capable of judicial resolution." When viewed in light of these principles, it is apparent that the defendants' motion to dismiss for lack of standing on the part of the plaintiff to maintain this action must be denied.

[2] It is next contended that although the defendant Board is a municipally created board with responsibility for management of municipally owned or leased theater and auditorium facilities, the Board's activities in this regard are of a proprietary and not of a governmental nature. It is therefore contended that leasing or not leasing these facilities is entirely optional with the Board, as would be true with a private owner. The defendants cite the following authorities in support of this proposition: *Avins* v. *Rutgers State University of New Jersey*, 3 Cir., 385 F.2d 151 (1967); *Warren* v. *Bradley*, 39 Tenn.App. 451, 284 S.W.2d 698 (1955); *City of Knoxville* v. *Heth*, 186 Tenn. 321, 210 S.W.2d 326; *Miami Beach Airline Service* v. *Crandon*, 159 Fla. 504, 32 So.2d 153; *State ex rel.* v. *Newton*, 3 Tenn.Civ.App. 93 (1912); *State of Washington ex rel. Tubbs* v. *City of Spokane*, 53 Wash.2d 35, 330 P.2d 718 (1958); *State of Ohio ex rel. White* v. *City of Cleveland*, 125 Ohio St. 230, 181 N.E. 24, 86 A.L.R. 1172; 56 Am.Jur. 2d "Municipal Corporations" § 556; and *Southeastern Promotions, Ltd.* v. *City of Oklahoma*, (Civil Action No. 72-105, D.C.W.D.Okl., Decided March 27, 1972). Generally speaking, the foregoing line of cases deals with the distinction between proprietary and governmental action and reason by analogy that proprietary action by a governmental body is to be judged by the same rules governing private proprietary action. While this line of reasoning by analogy may appear on the surface to have validity, the analogy breaks down under more careful examination. It would appear that the defendant Board in this case does act in a proprietary capacity in its management of its theater and auditorium facilities. However, whether the Board is acting in a proprietary capacity or in a governmental capacity, it is apparent that it remains a public body. It is further apparent that as a public body it could not allow men to use the auditorium but refuse under like circumstances to permit women to use it solely because they were women. It is apparent that the defendant Board could not permit persons of one religious persuasion to use the auditorium but under like circumstances refuse to permit those of another religious persuasion to use it solely because they were of another religious persuasion. The same would be true if the Board sought to discriminate upon the basis of race or national origin. Accordingly, it is apparent that whether the Board acts in a governmental capacity or in a proprietary capacity, it nevertheless remains a public body, and as such it cannot differentiate or discriminate where the sole basis of that differentiation or discrimination is for some constitutionally impermissible reason. This is tacitly recognized even in the defendants' last cited case above, the recent and unreported decision of *Soulheastern Promotions, Ltd.* v. *City of Oklahoma, supra*, wherein the Court stated, "It follows that the first part of numbered paragraph 8 of the lease contract govern-

ing the use of the Civic Music Center Hall is valid in that defendants are within their rights to decline to contract with exhibitors so long as they do not act arbitrarily."

While the Auditorium Board may lawfully deny use of its facilities unto all persons, or unto all persons for certain reasonably distinguishable types of activity, it cannot permit its use for a purpose to one person and deny its use for the same purpose to another person solely for a constitutionally impermissible reason, as for example to deny the latter person his right to freedom of speech. By way of illustration, if obscenity were the only reason advanced by the Board for denying use of its facilities and that contention of obscenity is not sustainable in fact and in law, the denial then becomes one for the constitutionally impermissible reason of denial of freedom of speech and the denial of a lease under such circumstances cannot stand.

[3] The third ground in the defendants' motion to dismiss, namely that the theatrical production for which a lease is sought by the plaintiff would violate both ordinances of the City of Chattanooga and laws of the State of Tennessee relating ot both public nudity and obscenity, raises issues of both fact and law which can only be decided after a trial on the merits of these contentions. These matters will accordingly be considered in the portion of this opinion dealing with the trial of the case on its merits.

[4] The fourth ground in the defendants' motion to dismiss is the allegation that the plaintiff, being a corporation, cannot maintain this action. In support of this ground the defendants rely upon the case of *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 59 S. Ct. 954, 83 L.Ed. 1423, wherein the Court stated:

> "Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit."

The holding in the foregoing case is inapplicable to the allegations in this case for the reason that the constitutional rights here claimed are due process, equal protection of the laws, and freedom of speech, and do not arise under the privileges and immunities clause. Corporations are considered persons within the provisions of the constitutional guarantees of due process, equal protection and freedom of speech. See *Grosjean* v. *American Press Company*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. The fourth ground of the motion to dismiss will likewise be denied.

[5] The fifth and final ground in the defendants' motion to dismiss is that the complaint fails to allege a federal question issue in that the defendants have not denied the plaintiff's right to speak, but at most have only denied the use of a particular forum in which to speak. It is apparent that this contention is without merit if in fact, as alleged by the plaintiff, the defendants have acted so as to deny the plaintiff equal protection of the laws, due process and freedom of speech.

Trial on the Merits

Turning to the merits of this lawsuit, the pleadings raise essentially the issue of whether the defendant Board acted within its lawful discretion in declining to lease its theater and/or auditorium facility to the plaintiff for the reason that the plaintiff's theatrical production "Hair" would violate Paragraph (1) of the standard lease form requiring the lessee to comply with all state and local laws in its use of the leased premises. More specifically, the issue presented by the pleadings is whether the theatrical production "Hair" would violate any constitutionally valid provision of the common law of Tennessee relating to indecent exposure, gross indecency, or lewdness or would violate any constitutionally valid provision of City ordinances and

State statutes which, among other matters, purport to make public nudity and obscene acts criminal offenses.[1]

[1] *Chattanooga Code*

Sec. 25-28. *Indecent exposure and conduct.* It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place.

Sec. 6-4. *Offensive, indecent entertainment.* It shall be unlawful for any person to hold, conduct or carry on, or to cause or permit to be held, conducted or carried on any motion picture exhibition or entertainment of any sort which is offensive to decency, or which is of an obscene, indecent or immoral nature, or so suggestive as to be offensive to the moral sense, or which is calculated to incite crime or riot.

Tennessee Code Annotated

Sec. 39-3008. — It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with the intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material . . .

* * * * *

The word "person" as used in this section shall include the singular and the plural and shall also mean and include any person, firm, corporation, partnership, co-partnership, association, or any other organization of any character whastoever.

Sec. 39-1013. *Sale or loan of material to minor — Indecent exhibits.* It shall be unlawful:

(a) for any person knowingly to sell or loan for monetary consideration or otherwise exhibit or make available to a minor;
  (1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person, or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;
  (2) any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in paragraph (1) hereof above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

(b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly to sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

This case, involving as it does the First Amendment right to freedom of speech, and the statutes and ordinances cited in the footnote asserting obscenity as a prohibited criminal offense, the issue of obscenity was severed for trial from other issues in the case and this issue was tried before the Court sitting with an advisory jury pursuant to Rule 39(c), F.R.C.P. The evidence upon the trial of the obscenity issue consisted of the full script and libretto with production notes and stage instructions (Exhibit No. 4), a recording of the sound tract of all musical numbers in the production (Exhibit No. 7), and a souvenir program (Exhibit No. 1). In addition there was received the testimony of seven witnesses who had witnessed the production "Hair," including two witnesses who attended a performance two days previous to their testimony, and an eighth witness who had not seen the production but had read the script and gave his interpretation as a drama critic. Following the completion of the evidence and the argument of counsel, the issue of obscenity was submitted to the jury upon instructions of the Court upon the issue of obscenity, as set forth in an appendix to this opinion.

After deliberation the jury returned the following verdict:

> (1) We, the jury find the theatrical production "Hair" to be *obscene* in accordance with the definition of obscene as it relates to freedom of speech under the First Amendment of the United States Constitution.
>
> (2) We, the jury, find the theatrical production "Hair" to be *obscene* in accordance with the definition of obscenity as it relates to conduct.

After discharge of the jury further evidence was received

by the Court upon issues other than obscenity, such evidence being principally with regard to the action of the Board in denying a lease of its facilities to the plaintiff and the standard form of lease required to be executed by all lessees (Exhibit No. 3). Following further argument of counsel the case was submitted to the Court upon the foregoing record.

Findings of Fact

Turning first to the issue of obscenity, the script, libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

> "Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother."

It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a "tribe" of New York "street people" start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song "Aquarius," the melody of which, if not the words, have become nationally, if not internationally, popular, according to the

evidence. The theme of the song is the coming of a new age, the age of love, the age of "Aquarius." Following this one of the street people, Burger, introduces himself by various prefixes to his name, including "Up Your Burger," accompanied by an anal finger gesture and "Pittsburger," accompanied by an underarm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, "What is this God-damned thing? 3,000 pounds of Navajo jewelry? Ha! Ha! Ha!" Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, "I'll bet you're scared shitless."

Burger then sings a song, "Looking For My Donna," and the tribe chants a list of drugs beginning with "hashish" and ending with "Methadrine, Sex, You, WOW!" (Exhibit No. 4, p. 1-5) Another male character then sings the lyric:

> "SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY — FATHER, WHY DO THESE WORDS SOUND SO NASTY? MASTURBATION CAN BE FUN. JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE." (Exhibit No. 4, p. 1-5)

The play then continues with action, songs, chants, and dialogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police

then appear in the audience and announce that they are under arrest for watching this "lewd, obscene show."

The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug "trip," impersonation of various figures from American history,[2] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, "Let the Sunshine In," a song the testimony reflects has likewise become popular over the Nation.

Interspersed throughout the play, as reflected in the script, is such "street language" as "ass" (Exhibit No. 4, pp. 1-20, 21 and 2-16), "fart" (Exhibit No. 4, p. 1-26), and repeated use of the words "fuck"[3] and the four letter word for excretion (Exhibit No. 4, pp. 1-7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who had seen the play. They are often unrelated to any dialogue and accordingly

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[2] Lincoln is regaled with the following lyrics: "I's free now thanks to you, Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci—mother fucking—pater of the slave, yeah, yeah, yeah! Emanci—mother fucking—pater of the slave, yeah, yeah, yeah!" With Lincoln responding, "Bang my ass . . . I ain't dying for no white man!"

[3] A woman taking her departure says to the tribe, "Fuck off, kids." (Exhibit No. 4, p. 1-35). The following dialogue occurs as Claude nears his death scene:

"Burger: I hate the fucking world, don't you?
"Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.
"Burger: I wish the fuck it would snow at least.
"Claude: Yeah, I wish the fuck it would snow at least.
"Burger: Yeah, I wish the fuck it would.
"Claude: Oh, fuck!
"Burger: Oh, fucky, fuck, fuck!" (Exhibit No. 4, p. 2-22)

could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, all the while the actors and actresses are in close bodily contact. At one point the character Burger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. At another point in the script (Exhibit No. 4, p. 2-22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses.

In support of the non-obscenity of the play "Hair" the plaintiff relies upon the contention that the simulated sexual acts consume only a small portion of the total performance time, that the nudity scene is brief and in reduced lighting, that the audience by attending consents to the play, that the play has been a financial success second only to the musical "Oklahoma," that the play has been performed in over 140 cities, that the music from the play has been upon the "Hit Parade," and that four other courts have found the play not to be obscene. *Southeastern Promotions, Ltd.* v. *City of Atlanta,* D.C., 334 F.Supp. 634 (1971); *Southeastern Promotions, Ltd.* v. *City of Charlotte,*

D.C., 333 F.Supp. 345 (1971); *P. B. I. C., Inc.* v. *Byrne*, D.C., 313 F.Supp. 757 (1970); and *Southwest Productions, Inc.* v. *Freeman*, (U.S.D.C. E.D.Ark., 1971).[4]

Obscenity

[6] The definition of legal obscenity as it relates to the First Amendment guarantee of freedom of speech is defined in the case of *Roth* v. *United States* (1957) 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, *reh. den.*, 355 U.S. 852, 78 S.Ct. 8, 2 L.Ed.2d 60. The definition of obscenity in *Roth* is further amplified in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639. Although there have been numerous intervening cases in the Supreme Court dealing with obscenity, the *Roth* test of obscenity has been reaffirmed as recently as the case of *Rabe* v. *Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (Decided March 20, 1972). Having set forth that definition in the Court's charge to the jury as set forth in the appendix to this opinion, the Court will here include only a summary statement of the rule as taken from the charge.

> "Thus, by way of summing up, before the theatrical production here in issue can be found to be legally obscene, these elements must coalesce; It must be established, first, that the dominant theme of the material taken as a whole appeals to a prurient interest in sex; and, second, that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and, third, that the material is utterly without redeeming social value."

[4] This Court has no knowledge of the facts before the courts in any of the cited cases, for they make little in the way of findings of fact. Furthermore, it is apparent from the evidence in this case that the manner of presentation of "Hair" is substantially modified from time to time and place to place. The version of the play upon which the findings of fact have been made by this Court was that presented two days before the trial and five days before the writing of this opinion.

Suffice it to say that the United States Supreme Court, unlike the English courts, does not permit the judging of a theatrical production in relevant portions in determining obscenity for the purposes of determining First Amendment freedom of speech rights. Rather, it is required that the production be judged as a whole and that it be granted First Amendment protection unless, among other matters, the production, when judged as a whole, is "utterly without redeeming social value." The latter concept has been interpreted with great strictness by the Supreme Court, with strong emphasis being placed upon the word "utterly." Furthermore, the Supreme Court has recently granted First Amendment protection to vulgar words similar to those here used. *Cohen* v. *California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Even apart from this, this Court could readily find, as did the jury, that substantial portions of the plaintiff's production is "utterly without redeeming social value." When required to view the production as a whole, however, including the music and those portions of the play that are not obscene, but at most only controversial, the Court cannot state that as a whole it is "utterly" without redeeming social value.

[7] Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment. These matters were dealt with by the United States Supreme Court in the case of *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). That case arose out of the burning of draft cards at an anti-war demonstration. The issue presented was whether a federal statute making the knowing destruction or mutilation of a draft card a

crime was an unconstitutional infringement upon the accused's right of freedom of speech. The Court, in upholding the statute from constitutional attack, stated:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest..."

[8, 9] It is further clear to this Court that conduct not within the First Amendment is not subject to the requirement that the production in which it takes place be judged as a whole, but rather that the conduct may be judged obscene or nonobscene on the basis of individual acts of conduct. It is abundantly clear that if a crime other than

the crime of obscenity were committed upon the stage, the actor committing that crime could neither claim First Amendment protection nor could he require that he be judged criminal or noncriminal on the basis of the production as a whole. If a murder, rape, mayhem or crime of assault were committed upon the stage, the actor perpetrating the same could claim no First Amendment protection, nor could he require that the theatrical production as a whole be reviewed in determining the criminality of his conduct. Accordingly, it must be that when the crime of obscenity is committed upon the live stage by conduct and not by speech, or symbolic speech, no First Amendment protection attaches to that conduct and no First Amendment requirement attaches that requires the production as a whole to be reviewed in determining such criminal obscenity.

This Court is aware that a district judge dealt differently with this issue in the case of *Southeastern Promotions, Ltd.* v. *City of Atlanta*, D.C., 334 F.Supp. 634 (1971) cited above. The Court there held that a stage production cannot be disected into speech and nonspeech components. The fallacy of that position is readily apparent, however, if any crime other than the crime of obscenity were committed in the course of a live stage production. That Court would doubtless have no difficulty in dissecting speech and nonspeech components if the crime committed on the stage were the crime of rape or homicide, even though called for in the script. It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the theatrical. This Court respectfully declines to follow the rule set forth by the district judge in the *Atlanta* case. The same fallacy attaches to each of the cases relied upon by the plaintiff in prior adjudications of the theatrical production "Hair."

[10] When viewed in their component parts, it is perfectly clear that the actors and actresses in the theatrical production "Hair," by their conduct, and apart from any element of speech, commit repeated acts of criminal obscenity that would be in violation of the ordinances of the City of Chattanooga and the statutes of the State of Tennessee forbidding acts of obscenity in public places. The Municipal Auditorium is a public place and the committing of live acts of simulated sexual intercourse, masturbation and mixed group nudity upon the stage before a live audience appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards, both state and national, relating to the representation of sexual matters, and it is utterly without redeeming social value.

[11] As regards the plaintiff's contention that the relative brevity of the sexual conduct in proportion to the total time of the play and the reduction of lighting on the scene of mixed group nudity relieves the conduct of its obscene character, these matters obviously constitute no defense to a charge of obscene conduct. These matters, on on the contrary, are but proof of the plaintiff's own awareness of the obscenity of the conduct, as further evidenced by the use of an actor policeman to announce to the audience at the conclusion of the first act that they are under arrest for watching this "lewd, obscene show." Instantaneous murder is no less a crime than slow poisoning. A dimly visible robbery is no less a crime than a well lighted one. Unlawful conduct is not rendered lawful by the wattage of the light bulb in which it is committed. Nor is it any defense that the acts other than nudity were simulated acts of sexual conduct. Simulated sexual acts are in themselves sexual conduct. Pregnancy does not have to result to establish sexual conduct.

[12] Likewise without merit is the plaintiff's contention that its performance is protected from regulation in that it is performed before a consenting audience. If audience consent were the test of First Amendment protection, then cock fights, bull fights, and Roman gladiatorial contests could no longer be regulated or forbidden by law.

As regards the constitutional validity of the ordinances and statutes relied upon by the defendants, insofar as those ordinances and statutes make obscenity as hereinabove defined a crime, there can be no doubt of their validity. As stated in *Berman* v. *Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954):

> "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

[13] Undisciplined sex is one of the most destructive forces in any society and has historically been so recognized. It is destructive of many human values and institutions, not the least of which is the family, which in turn has served as the foundation for every civilization yet known to man. Regulation of public and undisciplined sexual conduct is clearly within the police power of the state.

[14] It is likewise equally clear that the obscenity laws relied upon by the defendants, as they relate to obscene conduct, meet the other standards laid down in *United States* v. *O'Brien, supra.* They further an important or substantial governmental interest, that is the suppression of public and undisciplined sexual conduct, and the protection of public morality and welfare. Their purpose is unrelated to the suppression of free speech, or, at most, they impinge upon the First Amendment freedom no more than is essential to the furtherance of that governmental interest.

[15, 16] As regards the ordinance forbidding nudity in public places, that, too, can meet the standards for the exercise of police power as laid down in *United States* v. *O'Brien, supra,* particularly when applied to mixed group nudity upon the live stage, as occurs in the theatrical production here involved. Mixed group public nudity may become the accepted community standard in this Nation. But if it does, it should be by legislative approval, not by judicial fiat in the face of legislative action to the contrary.

[17] This Court is accordingly of the opinion that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the State of Tennessee. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Tivoli Theater unto the plaintiff.

In conclusion, it is not inappropriate to note that musical, literary, and dramatic ability are scarce talents. Vulgarity, nudity, and obscenity are abundant and readily available commodities. All are good box office. The temptation to substitute the latter commodities for the former talents has become well nigh irresistible in the entertainment world in recent years. "Hair" found musical talent. It combined it with vulgarity, nudity, and obscenity to come up with a box office hit.

An order will enter dismissing this lawsuit.

JURY INSTRUCTIONS

APPENDIX

This case has its basis in the First Amendment of the Constitution of the United States. You will recall that when I summarized for you the contentions of the parties, I advised you that the plaintiff was making the contention that the defendants had discriminated against the plaintiff

by denying the plaintiff a lease upon the Tivoli Theater and/or the Municipal Auditorium, and that the denial of such lease was in fact and in law a denial of the plaintiff's right of freedom of speech and of freedom of expression as secured to the plaintiff by the First Amendment and the Fourteenth Amendment of the Constitution of the United States. The First Amendment right of freedom of speech and freedom of expression extends to the plaintiff even though the plaintiff is a corporation. It is entitled to exactly the same right under the First Amendment with regard to freedom of speech and freedom of expression as would be any individual.

Upon the other hand, the defendants have denied that their action in refusing to lease the Tivoli Theater and/or the Municipal Auditorium was in violation of the plaintiff's right to freedom of speech or the plaintiff's right to freedom of expression or to the plaintiff's rights under either the First or Fourteenth Amendments of the United States Constitution. The defendants contend that the theatrical production which the plaintiff proposes to present and for which it seeks a lease is obscene and as such it accordingly is not entitled to the protection either of the First Amendment or of the Fourteenth Amendment of the United States Constitution. The issue for your decision, accordingly, has its legal basis in the First Amendment of the United States Constitution and the application of that Amendment to the facts of this case.

More particularly, the issue for your decision has its legal basis in the freedom of speech provision of the First Amendment. The relevance of referring to the Fourteenth Amendment in this regard is that the due process clause of the Fourteenth Amendment has the effect of making the provisions of the First Amendment binding upon the states and the cities and the local governments of this Nation as well as upon the Federal Government. You see, as

originally adopted, the First Amendment only purported to prohibit the United States Congress from making laws abridging freedom of speech, freedom of religion and freedom of assembly. But with the adoption of the Fourteenth Amendment, requiring that state and local governments extend due process of law to all persons, that Amendment had the effect of making the First Amendment binding upon the states, cities, and local governments within this Nation also.

Let me read for you the First Amendment of the United States Constitution. It reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Although the Amendment refers, as I have said, to the Congress, as I have further just explained to you, it is equally applicable to the government at all levels, including the State of Tennessee and the City of Chattanooga and including the defendants to this lawsuit, who, as members and officials of the Chattanooga Auditorium Board, are an arm of the City of Chattanooga and as such are subject to the prohibitions of the First Amendment.

The First Amendment as it relates to the issues in this lawsuit accordingly prohibits the defendants from taking any action which would have the effect of denying the plaintiff its right to freedom of speech as guaranteed in the First Amendment of the Constitution. You are instructed in this regard that a theatrical production as a mode of expression or as a mode of conveying ideas or entertainment is entitled to the protection of the freedom of speech provision of the First Amendment. However, freedom of speech is not an absolute or all encompassing

right. By that, I mean not every form of expression may claim to be protected by the constitutional guarantee of freedom of speech. One form of expression that does not come within the protection of the First Amendment is obscenity. That is, the denial to a person of the right to express himself in a manner that falls within the legal definition of obscenity is not a violation of that person's right to freedom of speech. Accordingly, the defendants may lawfully refuse to lease either the Tivoli Theater and/or the Municipal Auditorium to the plaintiff if the theatrical production "Hair" which the plaintiff proposes to present is obscene as I shall proceed to define that word "obscene" for you.

The word "obscene" is, of course, a word in common use and is a part of our everyday language. As we use it in our everyday language and as it is defined in Webster's Dictionary, it means "foul; disgusting; lewd." That, however, is not the definition that you must apply in testing the issue of obscenity in this case.

Now, I only point that out to you to point out that it is not the definition of legal obscenity. As I am using the word "obscene" in these instructions, it has a special, legal definition and you must apply that legal definition in deciding the issue that is for your decision in this case. The United States Supreme Court has defined (in the case of *Roth* v. *United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, as amplified in *Manuel Enterprises, Inc.* v. *Day,* 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639) the word "obscenity" as it relates to matters that do not fall within the protection of the freedom of speech provision of the First Amendment. This Court and this jury are bound by that definition and must follow that definition in making their determination in this case.

As defined by the United States Supreme Court, legal obscenity is any material to which the "average person,

applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Let me read the definition over for you again. As defined by the United States Supreme Court, legal obscenity is any material which to "the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Now, the Court goes further to define certain of those terms and expressions in that definition and I will give you those instructions likewise; but suffice it to say at this point that before the jury could find the theatrical production that is the subject of this lawsuit obscene, it must determine whether, to the average person applying contemporary community standards, the dominant theme of the material in that theatrical production taken as a whole appeals to prurient interest.

Let me now break that definition down for you into its component parts and explain for you the meaning of certain words and phrases as are used in that definition and as they have been further defined by the United States Supreme Court. You will notice that the first part of the definition refers to the average person applying contemporary community standards. The community standard here referred to is not a standard that varies from one locality to another within the Nation but rather means the contemporary national community standards.

You will notice that the second part of the definition of obscenity as established by the United States Supreme Court is that "the dominant theme of the material taken as a whole appeals to prurient interest." The phrase, "the dominant theme of the material taken as a whole," means that the theatrical production here challenged as obscene must be judged as a whole. The phrase "appeals to the prurient interest," means having a tendency to excite lust-

ful thoughts or material that appeals to a shameful or morbid interest in sex and is utterly without redeeming social value. The material must be patently offensive in that it goes substantially beyond contemporary limits of candor in description or representation of such matters.

Thus, by way of summing up, before the theatrical production here in issue can be found to be legally obscene, these elements must coalesce: It must be established, first, that the dominant theme of the material taken as a whole appeals to a prurient interest in sex; and, second, that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and, third, that the material is utterly without redeeming social value.

Now, in making your determination with regard to obscenity or non-obscenity, you will not be concerned with whether the material in the play is pro-religion or anti-religion; you will not be concerned with whether the material is pro-pollution or anti-pollution; you will not be concerned with whether the material is pro-free love or anti-free love; you would not be concerned with whether it is pro-drug culture or anti-drug culture; you would not be concerned with whether it is pro-parental authority or anti-parental authority; you would not be concerned with whether it is pro-war, anti-war or whether it is pro-government or anti-government or whether it expresses popular ideas or unpopular ideas. The concept of obscenity cannot be based upon the ideas that may be expressed, whether those ideas express these concepts or not. We are not here to judge those matters but rather you want to follow the definition of obscenity as I have given it to you in these instructions. In other words, it is not a question of whether you agree or disagree with the ideas being expressed or conveyed in the theatrical production "Hair." The ques-

tion is whether or not the material is obscene as I have defined that term or given you that definition.

So far in these instructions, in defining obscenity, I have been referring to speech in all of its forms, including conduct that is so closely related to speech as to be considered symbolic speech or expressive of speech. Just as speech may be obscene, likewise conduct, apart from speech or apart from conduct that is expressive of speech, may be obscene. However, there is a difference in obscenity as it refers to speech on the one hand, which I have just defined for you, and obscenity as it refers to conduct separate and apart from speech upon the other hand.

The freedom of speech provisions of the First Amendment refer to speech and not to human conduct that is not expressive of speech; that is, conduct apart from speech or conduct that is not so closely related to speech as to constitute symbolic speech as it is sometimes referred to. Since the freedom of speech provision of the First Amendment accords no protection against the regulation of human conduct by the government, whether federal, state or local, the freedom of speech provision of the First Amendment accords no protection against the regulation of obscene conduct by the various levels of government. Since the obscenity statutes and the ordinances relied upon by the defendants in this case apply to both obscene speech and to obscene conduct, then irrespective of how you may decide the issue of obscenity as it relates to the theatrical production "Hair" when considered as speech, and when considered as a whole, you should turn your attention to the conduct of the performers in the theatrical production "Hair" that is not speech or is not conduct that may be considered symbolic speech or expressive of speech and determine whether that conduct is obscene as I shall now define the word.

The definition of obscenity as it relates to conduct apart

from speech is the same as the definition of obscenity as it relates to speech with two exceptions. The first exception is that since no First Amendment federal constitutional issue is involved, obscene conduct may be judged in its component parts rather than merely judging the whole conduct or merely judging the whole of the theatrical production in making your judgment regarding obscenity on the basis of conduct as a whole or of the material of the production as a whole; that is, conduct may be adjudged obscene or non-obscene either as a whole or in any of its component parts.

The second difference between the definition of obscenity as it applies to conduct rather than speech is that since no First Amendment federal constitutional issue is involved, the community standard by which the conduct is to be judged is the community standard of the State of Tennessee rather than the community standard of the Nation as a whole. Thus, obscenity as it relates to conduct apart from speech means, first, conduct that appeals to the prurient interest in sex; and, second, conduct that is patently offensive because it affronts contemporary standards. The standards here referred to being those of the state in which the conduct occurs; and, third, conduct that is utterly without redeeming social value.

In addition to the matters I have instructed you, you are further instructed with regard to the issue of obscenity that not every portrayal of male or female nudity is necessarily obscene. It depends, of course, upon the context and circumstances. The portrayal of sex in art, literature or scientific works is not of itself sufficient reason for denying material the constitutional protection of freedom of speech; and, likewise, foul words just standing alone without regard to context of the whole content do not constitute legal obscenity as I have defined that term for you.

APPENDIX "B"

No. 72-1672
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOUTHEASTERN PROMOTIONS, LTD.,
Plaintiff-Appellant,
v.
STEVE CONRAD, ET AL.,
Defendants-Appellees.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

Decided and Filed May 30, 1973.

Before WEICK and McCREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge.

This is an appeal from dismissal of plaintiff-appellant's complaint seeking a declaratory judgment and a mandatory injunction whereby to require the Municipal Auditorium Board of Chattanooga, Tennessee, to lease a municipal theatre to appellant, there to exhibit the stage play HAIR. The theatre in question was under the control of such Auditorium Board. The case was heard at Chattanooga by the Honorable Frank W. Wilson, Chief Judge of the United States District Court for the Eastern District of Tennessee, Southern Division. He denied the relief asked by plaintiff-appellant.

We affirm the judgment of the District Court on the opinion of the District Judge. Such opinion is reported

as *Southeastern Promotions, Inc.* v. *Steve Conrad*, 341 F. Supp. 465 (E.D. Tenn. 1972).

While we adopt such opinion, we think it right to say this much more. After disposing of several grounds asserted by defendants to support their motion to dismiss, as without validity, the District Judge set out the controlling issues as follows:

> *"Trial on the Merits*
>
> "Turning to the merits of this lawsuit, the pleadings raise essentially the issue of whether the defendant Board acted within its lawful discretion in declining to lease its theater and/or auditorium facility to the plaintiff for the reason that the plaintiff's theatrical production 'Hair' would violate Paragraph (1) of the standard lease form requiring the lessee to comply with all state and local laws in its use of the leased premises. More specifically, the issue presented by the pleadings is whether the theatrical production 'Hair' would violate any constitutionally valid provision of the common law of Tennessee relating to indecent exposure, gross indecency, or lewdness or would violate any constitutionally valid provision of City ordinances and State statutes which, among other matters, purport to make public nudity and obscene acts criminal offenses." 341 F. Supp. at 471.

With instructions, the propriety of which appellant does not challenge, there was submitted to an advisory jury the question of whether the production was obscene. Their verdict said that it was. The judge, then reviewing the same evidence and correctly employing the governing rules, made his own finding that the play was obscene.

At the outset, we think that understanding of this decision will be aided by setting out the style, action and content of HAIR as recited in the District Court's opinion. That such recital was accurate is not here challenged by plaintiff-appellant. Here it is:

"Findings of Fact

"Turning first to the issue of obscenity, the script, libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

"The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

> 'Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother.'

It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a 'tribe' of New York 'street people' start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song 'Aquarius,' the melody of which, if not the words, have become nationally, if not internationally, popular, according to the evidence. The theme of the song is the coming of a new age, the age of love, the age of 'Aquarius.' Following this one of the street people, Burger, introduces himself by various prefixes to his name, including 'Up Your Burger,' accompanied by an anal

finger gesture and 'Pittsburger,' accompanied by an underarm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, 'What is this God-damned thing! 3,000 pounds of Navajo jewelry! Ha! Ha! Ha!' Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, 'I'll bet you're scared shitless.'

"Burger then sings a song, 'Looking for My Donna,' and the tribe chants a list of drugs beginning with 'hashish' and ending with 'Methadrine, Sex, You, WOW!'" (Exhibit No. 4, p. 1-5). Another male character thing sings the lyric.

> 'SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY — FATHER WHY DO THESE WORDS SOUND SO NASTY! MASTURBATION CAN BE FUN. JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE.' (Exhibit No. 4, p. 1-5)

"The play then continues with action, songs, chants, and diaglogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police then appear in the audience and announce that they

are under arrest for watching this 'lewd, obscene show.'

"The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug 'trip,' impersonation of various figures from American history,[2] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, 'Let the Sunshine In,' a song the testimony reflects has likewise become popular over the Nation.

"Interspaced throughout the play, as reflected in the script, is such 'street language' as 'ass' (Exhibit No. 4, pp. 1-20, 21 and 2-16), 'fart' (Exhibit No. 4, p. 126), and repeated use of the words 'fuck'[3] and the four letter word for excretion (Exhibit No. 4, pp. 1-7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

"Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who

[2] Lincoln is regaled with the following lyrics: 'I's free now thanks to you, Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci — mother fucking — pater of the slave, yeah! yeah! yeah! Emanci — mother fucking — pater of the slave, yeah! yeah! yeah!' With Lincoln responding, "Bang my ass . . . I ain't dying for no white man!'

[3] A woman taking her departure says to the tribe, 'Fuck off, kids.' (Exhibit No. 4, p. 1-35). The following dialogue occurs as Claude nears his death scene:

'Burger: I hate the fucking world, don't you?
'Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.
'Burger: I wish the fuck it would snow at least.
'Claude: Yeah, I wish the fuck it would snow at least.
'Burger: Yeah, I wish the fuck it would.
'Claude: Oh, fuck!
'Burger: Oh, fucky, fuck, fuck!' (Exhibit No. 4, p. 2-22)"

had seen the play. They were often unrelated to any dialogue and accordingly could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, al lthe whole the actors and actresses are in close bodily contact. At one point the character Burger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. *At another point in the script (Exhibit No. 4, p. 2-22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses.*

341 F.Supp. at 472-474 (Emphasis supplied).

The instructions which the District Judge gave to the jury are also set out in his opinion. While appellant, as a second position, asserts that the play HAIR is not in fact obscene, the principal thrust of its address to us is that the producer's First Amendment right to free speech forbids any interference with the exhibition of the play. They fault the District Judge for allegedly considering

the obscene conduct in the play independently from its "speech." Their argument appears to be that obscenity must be tolerated if it is a part of the same vehicle whereby First Amendment rights are allegedly being exercised. They say:

> "These forms of communication [motion pictures or plays] are to be treated for what they are, not artificially carved into speech and 'something else.' • • •
>
> "We think it apparent then that the judge's attempt to draw an artificial distinction between speech and conduct is wholly without support in either reason or authority."

We agree with the District Judge that free speech cannot be used as a vehicle to carry obscenity—thus to allow, without limit, public exhibition of obscenities. We must be aware that the speech of the play is employed to give meaning to the physical conduct of the players. While it is not necessary to affirmance of the District Judge, we are persuaded that the play's language—its speech—is itself obscene. Whether the play is considered separately as to its speech and its conduct, or they are joined, it is obscene.

Appellant's brief does not provide a succinct expression of a message conveyed by HAIR. From our reading of the witnesses who found, and attempted explanation of its message, we assume the message was to expose the "hypocrisy" of today's middle class, middle aged society, in its attitude toward sex. We do not think that any society can be charged with hypocrisy for finding less than beautiful,

> "SODOMY, FELLATIO, CUNNILINGUS, PEDERASTY — FATHER, WHY DO THESE WORDS SOUND SO NASTY?
> MASTURBATION CAN BE FUN.
> JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE."

The foregoing is a part of the lyrics of one of the play's songs. We are not persuaded that the First Amendment can be construed as providing that "anything goes" so long as a message is claimed to be given.

Appellant emphasizes the success that has attended the showing of HAIR, saying:

> "HAIR is a musical which deals with the life styles of many young people and their attitudes on the Vietnam war, racism, sex, drugs, pollution, etc. It has been produced in 140 American cities and in fourteen cities throughout the remainder of the world. *HAIR is the most popular box office attraction in the history of American theatre.*" (Emphasis supplied.)

One of appellant's witnesses, in speaking of HAIR's message, said that the play expresses "the hoped for *cleansing and rebirth* of this society," (Emphasis supplied). It was asserted by another, who compared HAIR with the musical "Oklahoma":

> "It [HAIR] brought a new kind of music to the theatre and a new seriousness even beyond that of 'Oklahoma' ".

Two college professors supported the claim that HAIR expressed a worthwhile message. A player identified himself as follows: "George Burger, Unzipped Burger, Pull 'em down Burger, Up Your Burger," and as recited by the District Judge, this was accompanied by an anal finger gesture. One of the professors said of this, "I think in some context it can have redeeming social value."

We ponder whether HAIR's box office success supports appellant or merely portrays that those charged with enforcing the law have now despaired of success in attempts to frustrate the obscenity and pornography which is being thrust upon today's total society.

Appellant says that the few district courts which have denied relief to the producers of HAIR were reversed on

appeal, citing *Southeastern Promotions, Ltd.* v. *City of West Palm Beach*, 457 F.2d 1016 (5th Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Oklahoma*, 459 F.2d 282 (10th Cir. 1972); and *Southeastern Promotions, Ltd.* v. *City of Mobile, Alabama*, 457 F.2d 340 (5th Cir. 1972). It will be sufficient to say that in none of these cases was obscenity *vel non* in issue.

We consider that the District Judge's opinion adequately discusses and disposes of all of the issues before him.

Judgment affirmed.

WEICK, Circuit Judge, concurring. I concur in Judge O'Sullivan's opinion. I would add only a few comments.

Ordinarily, an owner of real property may rent it to whomever he pleases. He would have the right to decide whether he ought to rent his property to persons who desire to exhibit conduct which is not in good taste. Certainly no court should order him under the First Amendment to exhibit offensive conduct portraying immoral sexual acts of the worst sort.

The auditorium involved in this case belonged to the City, which is a political subdivision of the State. It was constructed with taxpayers' money. It goes without saying that the city fathers could not be compelled to rent the auditorium to a person who desired to operate therein a house of ill fame, in violation of state law. Yet the conduct exhibited by the film in the present case is even worse as it portrays obscene sexual acts which could be committed only by depraved persons.

We do not consider here the right of a person to exhibit such a film on his own property or on property which he has rented. Our case involves only the question whether a federal court has any right to order the state to permit

the exhibition for profit of filthy, obscene, sexual material on state property. Federal Courts ought not take over the operation of state facilities.

In *California* v. *LaRue*, 409 U.S. 109 (1972), the Court upheld the right of the state to prohibit the exhibition of obscene material in a private saloon. Here, we are dealing, not with private property, but with public property and with police power of the state.

As pointed out in *LaRue*, the First Amendment protects "expression", not "action". Our case involves only depraved sexual action.

We would doubt that a Federal Court would ever attempt to compel the Federal Government to rent its property for any such immoral purpose. It is also inconceivable that a Federal Court would order such an exhibition to be held in the Eisenhower Theatre located in the John F. Kennedy Center for the Performing Arts at the Capitol. State facilities should be treated with the same respect as federal facilities.

No one has a constitutional right to exhibit obscene sexual acts in public buildings.

•

MCCREE, Circuit Judge (Dissenting). I respectfully dissent. I believe Judge Edenfield correctly stated the test to be applied in determining whether a play is obscene in his opinion in *Southeastern Promotions, Ltd.* v. *City of Atlanta*, 334 F. Supp. 634, 639 (N.D. Ga. 1971), in which an official of the Atlanta Civic Center refused to lease the auditorium for the exhibition of "Hair":

> The court cannot accept the proposition that stage productions may be dissected into 'speech' and 'non-speech' components as those terms have been used by the Supreme Court. The nonverbal elements in a

> theatrical production are the very ones which distinguish this form of art from literature. It may be true that First Amendment protections vary in different media, but a musical play must be deemed a unitary form of constitutionally protected expression. The court concludes that the entire musical play 'Hair' is speech and entitled to First Amendment protection.

The District Judge in our case sought unsuccessfully to distinguish Judge Edenfield's opinion by stating:

> The fallacy of that position is readily apparent, however, if any crime other than the crime of obscenity were committed in the course of a live stage production. That Court would doubtless have no difficulty in disecting [sic] speech and nonspeech components if the crime committed on the stage were the crime of rape or homicide, even though called for in the script. It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the theatrical.

Southeastern Promotions, Ltd. v. *Conrad,* 341 F. Supp. 465, 476 (E.D. Tenn. 1972). It begs the question to call an act viewed in isolation as criminal when the constitutional test of criminality *vel non* requires it to be examined in context. *Roth* v. *United States,* 354 U.S. 476 (1956); *Memoirs* v. *Massachusetts,* 388 U.S. 413 (1966).

As Mr. Justice Marshall stated in his dissent in *California* v. *LaRue,* 409 U.S. 109, 130 (1972):

> If, as these many cases hold, movies, plays and dance enjoy constitutional protection, it follows, ineluctably I think, that their component parts are protected as well. It is senseless to say that a play is 'speech' within the meaning of the First Amendment, but that the individual gestures of the actors are 'conduct' which the State may prohibit.

The majority opinion in *LaRue* implicitly rejected the technique of excerpting and censoring specific conduct from a protected vehicle. In observing that "[t]he state regulations here challenged come to us, not in the context of censoring a dramatic performance in a theatre, but rather in the context of licensing bars and nightclubs to sell liquor by the drink," 409 U.S. at 114, the Court acknowledged that some of the performances banned by the regulations from presentation in establishments licensed to sell liquor by the drink would have been protected if offered in a theater:

> We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. See, *e.g., Sunshine Book Co.* v. *Summerfield,* 355 U.S. 372 (1958) rev'g *per curiam,* 101 U.S. App. D.C. 358, 249 F. 2d 114 (1957). But we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in *O'Brien, supra.*
>
> . . .
>
> The substance of the regulations struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, "performances" that partake more of gross sexuality than of communication. While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the

critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink.

Viewed in this light, we conceive the State's authority in this area to be somewhat broader than did the District Court. This is not to say that all such conduct and performance is without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theatre. 409 U.S. at 116, 118.

Nevertheless, and perhaps because of reluctance to rely solely on the theory of the District Court, my brothers in this appeal make their own additional finding (consistent with that of the advisory jury) that the play "Hair," viewed as a whole, is obscene. With this determination I also disagree. However, instead of contributing further to the already too extensive and inelegant legal literature recounting tawdry details of challenged works, I observe merely that I know an obscene play when I see one and upon autoptic view "Hair" is not that. *See Jacobellis* v. *Ohio,* 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

I would reverse and remand with instructions to grant the relief prayed for.

APPENDIX "C"

No. 72-1672

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SOUTHEASTERN PROMOTIONS, LTD.,
Plaintiff-Appellant,

v.

STEVE CONRAD, ET AL.,
Defendants-Appellees.

ORDER.

Decided and Filed October 30, 1973.

Before WEICK and McCREE, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

THIS CAUSE is before the Court upon the motion of Plaintiff-Appellant for rehearing, with suggestion for rehearing en banc; and Appellees having filed a brief responsive to said motion, as ordered by this Court; upon request for a vote to be taken, a majority of the active judges of this Court voted against such rehearing en banc. Therefore,

IT IS ORDERED that rehearing in banc be, and the same is, hereby denied. Judge Edwards and Judge McCree dissent.

Such motion for rehearing in banc having been denied, the matter of rehearing has been considered and will be disposed of by the panel that originally heard the appeal. Therefore,

IT IS ORDERED that the petition of Plaintiff-Appellant for rehearing be, and the same is, hereby denied. Judge McCree dissents.

Entered by order of the Court.

JAMES A. HIGGINS
Clerk

WEICK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Judge Edwards' dissent from denial of an in banc rehearing, with concurrence of Judge McCree, suggests the propriety of this supplement to the original majority opinion.

The dissent asserts:

> "Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play 'Hair' is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee • • •."

We respectfully disagree. The procedural setting of this litigation makes clear the invalidity of such observation, as well as the inapplicability of the authorities cited in the dissent.

This case involved an action in equity. Plaintiff sought the aid of equity for a declaratory judgment and a mandatory injunction to require the Board of Directors of the Chattanooga Memorial Auditorium to allow exhibition therein of the play HAIR. The complaint relied on 42 U.S.C. §§ 2201 and 2202, which empower courts of equity to enter declaratory judgments. The complaint also averred deprivation of civil rights, but nowhere does the plaintiff assert a civil right to put on its show wherever it chooses. The following general principles apply to the granting or withholding of the relief sought by appellant.

> "Injunction is distinctly an *equitable remedy*, the power to grant which stands forth as a distinct head of equitable jurisprudence and the principal and most important of its issued processes." 42 Am. Jur. 2d. *Injunctions* § 2, at 727-28 (1969). (Emphasis supplied.)

Application for such equitable relief invokes the Court's discretion.

> "Injunctive relief, whether prohibitory or mandatory, is granted or withheld in the exercise of sound judicial discretion • • • •." 42 Am. Jur. 2d. *Injunctions* § 20, at 751 (1969).

Applications for a declaratory judgment are likewise addressed to equity's discretion. In *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431 (1948), the Supreme Court said:

> "A declaratory judgment, like other forms of *equitable relief*, should be granted only as a matter of judicial discretion, exercised in the public interest." (Emphasis supplied.)

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967) the Court said:

> "The injunctive and declaratory judgment remedies are discretionary, • • • •."

The history and purpose of the creation of Soldiers & Sailors Memorial Auditorium by the people of Chattanooga are set out in a booklet which was received in evidence at trial. Its preface recites:

> "The dedication of the Soldiers and Sailors Memorial Auditorium marks, as permanently as the work of finite hands may mark, the grateful appreciation in which Chattanooga holds her sons who offered their lives to the Nation's service in the great World War [World War I].
>
> "We erect for posterity, in commemoration of their patriotism, a hall in which mementoes of their achievement may rest; an auditorium in which great bodies of our people may assemble for civic service; *for the cultivation of the arts; for the promotion of a higher and a broader citizenship.* It is fitting and well that

our tribute should take this form." (Emphasis supplied.)

The booklet, "Souvenir of Dedication" under a heading, "Its Operation and Management" sets out:

"It is the hope and ambition of the Board of Directors of the Soldiers and Sailors Memorial Auditorium to conduct the operation of the building in such manner as to render the greatest possible service to all the people of Chattanooga, Hamilton County and this section of the South.

"It will be their endeavor to make it the community center of Chattanooga, where civic, educational, religious, patriotic and charitable organizations and associations may have a common meeting place to discuss and further the upbuilding and general welfare of the city and surrounding territory.

"It will not be operated for profit, and no effort to obtain financial returns above the actual operating expenses will be permitted. *Instead its purpose will be devoted for cultural advancement, and for clean, healthful, entertainment which will make for the upbuilding of a better citizenship.*" (Emphasis supplied.)

The booklet's picture of the auditorium shows it to be a beautiful and commodious public building. The plaintiff-appellant, a New York Corporation — booking agent for the play HAIR — first sought to use a theatre, the Tivoli, a one-time commercial theatre which had been acquired by the City. Desiring, however, the larger capacity of the auditorium, the plaintiff sought equity's aid to force opportunity to use it. A witness for plaintiff testified that a one-night production of their play in the auditorium would have made a profit in excess of $10,000. Having in mind the purposes for which the people of Chattanooga created their Soldiers & Sailors Memorial Auditorium, a court of

equity cannot be faulted for withholding its writ whereby to command the Directors of the Auditorium to allow exhibition therein of a production containing the language and conduct set out in the District Judge's opinion.

We are not persuaded that the great principles which control employment of equitable remedies must stand aside when the courts are dealing with the ever-widening contests requiring resolution of what is and what is not obscenity. We had thought that Judge Weick's concurring opinion succinctly exposes the validity of this conclusion. We are constrained, however, by the current dissent to make these more extensive observations.

It is true that the District Judge did make a finding that the play HAIR is obscene and a violation of the ordinances of the City of Chattanooga and the statutes of Tennessee. In the original opinion of Judge O'Sullivan such a finding was approved. We believe, however, that it was not improper for the District Judge to consider whether the play was obscene before determining whether or not to order the Directors of the Auditorium to allow its exhibition in Chattanooga.

While we do not claim that its facts make our opinion in *Associated Students of Western Kentucky University* v. *Downing*, 475 F.2d 1132 (6th Cir. 1973) a totally controlling precedent, we cite it as being consonant with what we say here. There, the governing officials of the named University cancelled a booking contract which it had previously made for the showing of a moving picture film described in the opinion. As here, plaintiffs sought a declaratory judgment and injunctive relief whereby to forbid the governing officials of Western Kentucky University from prohibiting exhibition of the film sponsored by plaintiffs — Associated Students of Western Kentucky University. In affirming refusal of the governing Board of the University to allow exhibition of the film, we said:

"In the present case the University did nothing more than to make a determination that, with respect to a particular experimental film, it would be 'inappropriate for the University to continue as a contracting party.' " 475 F.2d at 1134.

We have considered the recent decisions of the Supreme Court in *Miller* v. *California*, —— U.S. ——, 41 U.S.L.W. 4925 (1973), and *Paris Adult Theatre* v. *Slaton, District Attorney*, —— U.S. ——, 41 U.S.L.W. 4935 (1973), and consider that our decision and that of the District Court in the case before us are not inconsistent therewith.

EDWARDS, J., dissenting, with whom MCCREE, J., joins:

One of the "basic guidelines" recently reaffirmed by the Supreme Court in relation to the determination of a charge of obscenity is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, —— U.S. ——, —— (1973), 41 U.S.L.W. 4925, 4928 (June 21, 1973). *See also Roth* v. *United States*, 354 U.S. 476 (1957).

In this case the Municipal Auditorium Board of the City of Chattanooga has refused to rent the auditorium for the presentation of the play "Hair." A United States District Court has refused to grant relief from the board's decision on the ground that "Hair" is obscene. A panel of this court has affirmed the District Court, also holding that "Hair" is obscene. And the majority of our court has now rejected a motion to rehear the case in banc. All of this has been accomplished without any one of those participating in rejecting the play ever having seen it.[1] And at no level has any board member or judge entered a finding that the play "lacks serious literary, artistic, political, or scientific value."

[1] Judge McCree who did see the play dissented from the majority opinion characterizing it as obscene.

While I would agree that at least some of the acts described so vividly in the opinions of the District Court (*Southeastern Promotions, Ltd.* v. *Conrad, et al.*, 341 F. Supp. 465 (E.D. Tenn. 1972)) and of this court (*Southeastern Promotions, Ltd.* v. *Conrad, et al.*, —— F.2d —— (6th Cir. 1973)) could, if viewed separately, appropriately be labelled obscene under the present standards of the United States Supreme Court (*see Miller* v. *California, supra*, 41 U.S.L.W. at 4928.) I do not agree that the play may be judged obscene, unless it is "taken as a whole" for purposes of that judgment. Thus far we have signally failed to do this. Taking words and sentences out of context, taking gestures employed in a play without reference to the rest of the play as has been done herein does not comply with the standard[2] set out in *Miller, supra*, and *Roth, supra*.

Over and above the first amendment violation described above the procedures employed to ban this play amounted to unconstitutional prior restraint on speech. *See Paris Adult Theatre* v. *Slaton*, —— U.S. ——, 41 U.S.L.W. 4935 (June 21, 1973); *Blount* v. *Rizzi*, 400 U.S. 410, 417 (1971); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141-42 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).

Additionally the standards employed by the Municipal

[2] "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact, must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin*, *supra*, 408 U.S. [229], at 230 (1972), quoting *Roth* v. *United States*, *supra*, 354 U.S., at 489 (1957) (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 41 U.S.L.W. at 4927-28.

Auditorium Board in rejecting the application for rental at the theatre are clearly unconstitutionally vague.[3]

Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play "Hair" is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee — and this, we repeat, without any board member or judge so holding ever having seen the play.

My colleagues Judges Weick and O'Sullivan appear to dispute the accuracy of the paragraph above. I will let the record speak for itself.

Judge O'Sullivan's opinion, in which Judge Weick concurred, said:

> We affirm the judgment of District Court on the opinion of the District Judge.

The opinion of the District Court held:

> This Court is accordingly of the opinion that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the City and of the State of Tennessee.

Reviewing the evidence independently, Judge O'Sullivan's opinion held:

> While it is not necessary to affirmance of the District Judge, we are persuaded that the play's language — its speech — is itself obscene. Whether the play is considered separately as to its speech and its conduct, or they are joined, it is obscene.

---

[3] The Chattanooga Commissioner in charge of the municipal theatre testified before the District Court that the theatre was refused for presentation of "Hair" because the city permitted only productions which are "clean and healthful and culturally uplifting."

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UNITED STATES DISTRICT COURT

NO. 6379

SOUTHEASTERN PROMOTIONS, INC.

vs.

STEVE CONRAD, EDGAR COLLINS, LAMAR EAKER, COIL RICKETTS, EVERETT ALLEN, ARTHUR PROVENSANO, MRS. DANIEL J. WINDHAM, MRS. RUTH GOLDEN, RALPH SHUMACKER, EDGAR BURKEEN & GEORGE McINTURFF

CIVIL DOCKET

Date	Proceedings
1971	
11-1	Complaint & Application for Temporary Restraining Order or alternatively for preliminary injunction filed, together with plaintiff's trial brief in support of petition for injunction filed.
11-1	ORDER, WILSON, D.J. setting oral hearing on plaintiff's application for a Preliminary Injunction on Thursday, 11/4/71 at 4:00 p.m. filed. Service of order together with complaint and summons handed to U.S. Marshal for service.
11-3	Summons returned executed 11/1/71 on each defendant and filed. Sertel, DUSM – $33.00

11-4 Came the respective parties by counsel. Plaintiff presented its proof through Robert Sharon, its president, and rested. Defendant, Steven Conrad, chairman of defendant Board, presented proof of defendant and rested. Court heard argument of counsel. Cause taken under advisement by the Court. Wilson, D.J. Order Book 5, p. 703.

11-5 Defendants' Memorandum of Law, showing cause why a preliminary injunction should not be granted, with attachments, filed. Service by counsel.

11-5 Plaintiff's supplemental brief filed. Service by counsel.

11-5 Amended complaint filed. Service by counsel.

11-5 Motion by plaintiff for show-cause order filed. Service by counsel.

11-8 MEMORANDUM, WILSON, D.J. denying plaintiff's petition for preliminary injunction and reserving any further ruling until the court docket will permit a hearing on the issues involved herein, filed. Service to counsel of record by clerk.

11-9 ORDER, WILSON, D.J. according to Memorandum heretofore entered denying motion by plaintiff for preliminary injunctive relief entered Order Book 6, p. 12 and filed. Service of true copies by clerk to counsel of record.

11-22 Motion by defendants to dismiss complaint, with copy of transcript of the sworn testimony in preliminary hearing, as exhibit, and with brief in support, filed. Service by counsel.

1972

3-16 Motion by plaintiff for leave to amend complaint, with brief in support and supplemental brief in support of motion for temporary restraining order and application for expedited hearing filed. Proposed amendment tendered.

3-23 ORDER, WILSON, D.J. allowing plaintiff's motion to amend its complaint; action on defendant's motion to dismiss reserved pending the hearing set for April 3, 1972; defendants shall file answer to complaint within 10 days; hearing on all pending issues set for 9:00 a.m. 4/3/72, at which time all issues of fact in regard to obscenity will be for trial before a jury and the evidence received at the preliminary hearing held 11/4/71 may be used by either party to extent relevant & permissible under Fed. Rules of Civil Procedure, filed. Copies handed by clerk to U. S. Marshal for immediate personal service upon counsel of record.

3-23 Request by defendants for production of documents filed. Service by counsel.

3-23 Amended complaint and application for temporary restraining order filed. Service by counsel.

3-31 Answer by defendants to complaint filed. Service by counsel.

3-31 Defendants' Trial Brief filed. Service by counsel.

4-3 Came the parties by counsel and the trial to a jury was commenced as to the issue of "obscenity." Defendant, Board, having the burden of proof, commenced presentation of its proof but did not complete; jury excused to 9:00 a.m., Tuesday, April 4, 1972. Wilson, D.J. Order Book 6, p. 552.

4-4 Came the same parties, counsel & jury as of yesterday and the trial of this case was resumed. Defendant's proof completed. Motion by plaintiff to disallow defendants' claim of obscenity – overruled. Plaintiff's proof completed. Jury respited to 4/5/72, 9:00 a.m. Alternate Juror, Mr. Henson, #108, excused. Court heard arguments on renewed motion to disallow claim of obscenity. Taken under advisement by the Court. Wilson, D.J. Order Book 6, p. 555-b.

4-5 Came the same parties, counsel and jury as of yesterday. The motion to disallow claim of obscenity taken under advisement yesterday by the Court was overruled and the question is to be presented to the jury. Arguments. Charge. Verdict: The musical "HAIR" is obscene as to speech; and (2) The musical "HAIR" is obscene as to conduct. Jury excused. Court heard further arguments as to matters remaining in the case. Cause taken under advisement, and Court to file findings of fact and conclusions of law. Order Book 6, p. 558.

4-5 Verdict Form filed.

4-6 Clerk's copy of transcript of the Court's Charge to the Jury filed.

4-7 MEMORANDUM, WILSON, D.J. that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances of the City and of the State of Tenn. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Tivoli Theatre unto the plaintiffs. Musical, literary

and dramatic talent are scarce commodities. Vulgarity, nudity, and obscenity are abundant and readily available. The temptation to substitute the latter commodities for the former talents has become well nigh irresistible in the entertainment world in recent years. "Hair" found musical talent. It combined it with vulgarity, nudity, and obscenity to come up with a box office hit, filed. An order will enter dismissing this lawsuit. Personal service to all counsel of record.

4-7 Motion by plaintiff for Injunction pending appeal filed. Service by counsel.

4-7 ORDER, WILSON, D.J. according to Memorandum heretofore filed dismissing this lawsuit, entered Order Book 6, p. 668 and filed. Service by Clerk of true copy to all counsel of record.

4-7 Notice of Appeal by plaintiff filed. Service by clerk.

4-7 ORDER, WILSON, D. J., denying pltf.'s motion for an injunction pending appeal, entered Order Book 6, p. 672 and filed. Service by clerk to counsel of record.

4-7 $250.00 appeal bond filed.

4-12 Copy of docket entries mailed to counsel of record by clerk.

1973

5-30 Order and Opinion of the Court of Appeals affirming decision of the District Court. See petition for Certiorari 56-58.

10-30 Orders denying suggestion of rehearing en banc and petition for rehearing en banc.

12-26 Petition for a Writ of Certiorari.

1974

2-19 Writ of Certiorari granted.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

SOUTHEASTERN PROMOTIONS, INC.
Plaintiff,

vs.

STEVE CONRAD, EDGAR COLLINS, LAMAR EAKER, COIL RICKETTS, EVERETT ALLEN, ARTHUR PROVENSANO, MRS. DANIEL J. WINDAM, MRS. RUTH GOLDEN, RALPH SHUMACKER, EDGAR BURKEEN and GEORGE McINTURFF,
Defendants.

PLAINTIFF'S ORIGINAL COMPLAINT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ALTERNATIVELY FOR PRELIMINARY INJUNCTION

(Filed November 1, 1971)

Comes now SOUTHEASTERN PROMOTIONS, INC., hereinafter called plaintiff, complaining of City Commissioner STEVE CONRAD, Chairman of the Board of Directors of Memorial Auditorium, and the following members of said Board: EDGAR COLLINS, LAMAR EAKER, COIL RICKETTS, EVERETT ALLEN, ARTHUR PROVENSANO, MRS. DANIEL J. WINDAM, MRS. RUTH GOLDEN, RALPH SHUMACKER, EDGAR BURKEEN and GEORGE McINTURFF, hereinafter called defendants, and would respectfully show the Court as follows:

1. The plaintiff is an organization incorporated and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business in New York City, New York.

2. The defendant STEVE CONRAD is the duly elected commissioner of Public Utilities, Grounds and Buildings of the City of Chattanooga, and in such capacity is Chairman of the Board of Directors of Memorial Auditorium and the remaining defendants are currently duly appointed members of the Board of Directors of Memorial Auditorium in accordance with Article XII, Section 2-236 of the Code of the City of Chattanooga; that the defendants in their capacity as Board of Directors of the Chattanooga Memorial [2] Auditorium have complete control in the entire management of the Tivoli Theatre under Article XII, Section 2-238 of the Code of the City of Chattanooga.

3. Jurisdiction is conferred upon this Court by virtue of 28 U.S.C.A., Section 1332, and the amount in controversy in this suit exceeds the sum of $10,000.00 exclusive of interest and costs; likewise, jurisdiction is conferred on this Court by 28 U.S.C.A., Section 1343 (Subsections 3 & 4) providing for original jurisdiction of this Court as authorized by 42 U.S.C.A., Sections 1981, 1983 and 1988. This is an action authorized by 42 U.S.C.A., Sections 1981, 1983 and 1988 for an injunction and for declaratory relief pursuant to 28 U.S.C.A., Sections 2201 and 2202, seeking declaration and findings of the rights and legal relations of the parties herein. The declaratory judgment sought is that action taken by the members of the Board of Directors of Memorial Auditorium is violative of the rights of the plaintiff given it under the First and Fourteenth

Amendments to the Constitution of the United States, and for injunctive relief in said action.

4. The plaintiff is being deprived of rights secured it by the First and Fourteenth Amendments of the Constitution of the United States in that the defendants have denied the plaintiff, through an exercise of a prior restraint and infringement upon speech, expression and association, the right to present the musical stage play "Hair" in a municipal auditorium of Chattanooga, commonly known as the Tivoli Theatre.

5. The Board of Directors of the Memorial Auditorium were contacted by an agent of the plaintiff on September 11, 1970, with the request of the plaintiff to present the musical stage play "Hair" in the Tivoli Theatre at some subsequent time and said request was denied by the members of the Board; on April 2, 1971, an agent of the plaintiff again contacted the members of the aforesaid Board to present the aforesaid musical stage play in the [3] Tivoli Theatre and said Board once again rejected plaintiff's request. On October 29, 1971, at the regular monthly meeting of the Board of Directors of Memorial Auditorium, plaintiff once again requested said Board to be allowed the right to present the musical stage play "Hair" in the Tivoli Theatre during the period November 23, 1971 through November 28, 1971, having ascertained beforehand from Clyde Hawkins, the manager of the Tivoli Theatre that the aforesaid dates were available. However, the defendants in their capacity as Board of Directors of the Memorial Auditorium rejected plaintiff's request and indicated that under no circumstances would they voluntarily contract with the plaintiff to present the musical stage play "Hair" in the Tivoli Theatre.

6. Plaintiff alleges upon information and belief that the action taken by the Board of Directors of the Tivoli

Theatre was an arbitrary abuse of discretion as shall be more fully set out hereinbelow. This Board has autonomous authority in renting out the theatre facility and scheduling its use. Article XII, Section 2-238 of the Code of the City of Chattanooga. None of the defendants have heretofore adopted any policy whatever, concerning the type of programs of public entertainment, amusement and education, that would be allowed to be booked at and shown in the Tivoli Theatre in the City of Chattanooga, Tennessee. In the absence of such an established and ascertainable policy, the actions of the defendants amount to an abuse of discretion which is clearly a prior restraint upon plaintiff's right of expression, speech and association.

7. Plaintiff would further show this Court that upon plaintiff's demand for an explanation from the manager of the Tivoli Theatre as to the reason or policy grounds upon which the plaintiff was denied the right to present "Hair" in the said theatre, no reason or policy grounds were given and the plaintiff was informed that the defendants determined that the show could not be played in Chattanooga.

8. The basis upon which the plaintiff has been denied the right to exhibit the musical road show "Hair" in the City of [4] Chattanooga does not withstand intelligent scrutiny. The plaintiff alleges upon information and belief that the production of "Hair" which it seeks to show in the City of Chattanooga displays very little nudity per se, and that this show is not obscene within the legal meaning of that term. The production "Hair" employs a great number of persons, as actors, musicians, stagehands, members of the production crew; ushers, ticket takers, and others. The play sought to be produced in Chattanooga is, with minor exceptions, a replica of the Broadway production in New York City which has run since April 29,

1968. Prior to that date for several months, the play ran off Broadway. Plaintiff further alleges from information and belief that the road tour productions of "Hair" have played in such cities as New York, Los Angeles, San Francisco, Chicago, Las Vegas, Toronto, Boston, Paris, Munich, Hamburg, Berlin, Belgrade, Tokyo, Sydney, Sao Paulo, Amsterdam, Stockholm, Copenhagen, Helsinki, Tel Aviv, Rome and Buenos Aires. In none of these cities has any public authority denied to the producers the right to show and stage the said play, nor have facilities been denied to the various producers of said play, nor have any of the authorities of said cities interfered with or harassed the showing of "Hair", or instituted any type of prosecution as a result of any act arising from the production of "Hair".

9. Plaintiff further alleges that this production portrays and reflects the attitudes, feelings and life styles of a significant portion of the younger people of the United States, and deals with such matters in a serious manner. The production evaluates and shows some of the most fundamental values and socio-political issues prevalent in this country today, such as the draft, the Vietnamese War, racism, air pollution, and the sexual revolution, all of which are subjects of serious concern, analysis and debate throughout the United States. While presented in good measure in song and dance, these issues are seriously dealt with, and reflect both the rationale and the emotional disposition of a [5] significant segment of the American society as it relates to such issues. A high degree of artistic skill is demonstrated in the music, choreography, setting and development of character. Two of the songs from the production have become contemporary classics, "The Age of Aquarius", having been utilized as a key theme by the Peace Corp in the public relations activities of the United States Government, and the song "Let the Sun Shine In",

having been adopted as the theme for the Summer Thing Festival, 1970, for the City of Boston. Both of these songs are repeatedly played over the air, used as production numbers on television, and at one time were upon various best seller lists in the record making industry. A segment of this show was performed on National Television on Sunday, March 8, 1970, on the Ed Sullivan Show before an estimated audience of thirty million persons. The total production, utilizing the various elements eluded to and included in the show that the plaintiff seeks to stage in the Chattanooga auditorium, has won acclaim from leading drama critics throughout the United States and abroad. This is the showing that the defendants seek to prevent.

10. The plaintiff further says that the stage production sought to be performed in the Tivoli Theatre, a municipal auditorium, is not "obscene", as that term is legally defined. The dominate theme of "Hair", taken as a whole, does not appeal to the prurient sexual interest. The dominate theme of "Hair" is not sex, nudity, or anything of that nature, but a comment upon the socio-political atmosphere existant within the United States of America today. Nor is "Hair" patently offensive, and an affront to contemporary community standards relating to the description or representation of sexual matters. The use of four-letter words in the play "Hair" is duplicated in the sound tract, which has been distributed as a phonograph album and sold in every record store in the nation. And plaintiff avers that "Hair" has social redeeming value.

11. Plaintiff would further show the Court that the unwarranted and oppressive power restraining or expression, speech and [6] association engendered by the defendants' actions, will result in an immediate and irreparable injury to the plaintiff unless the defendant Board of Directors are temporarily enjoined from booking any

production or activity or otherwise encumbering the Tivoli Theatre during that period from November 23, 1971 through November 28, 1971; and that if plaintiff is not granted such relief, no adequate remedy of law will be sufficient to repair his injuries. While the actions of the defendants, if allowed to stand, will deprive the plaintiff of monetary profits in an amount in excess of $10,000.00, such damages are perhaps compensable in an action at law maintainable against the City of Chattanooga. However, plaintiff has no adequate remedy of law to compensate him for the stifling of his right to speech, to expression, and his right of association. During the pendency of this suit, should the Tivoli Theatre be booked for another for the dates in question, the plaintiff's complaint becomes moot and the defendants will have accomplished in practicality what is impossible in equity. No amount of monetary damages will recompense plaintiff's loss of freedom of expression; no remedy at law exists to compel the defendants to allow the plaintiff's exercise of his first and fourteenth amendment rights.

12. Moreover, the plaintiff alleges upon information and belief that there is no other facility in the Chattanooga area that has the seating capacity, the acoustical design, and the stage equipment and props, as well as the electrical set up, required of a production the size and scope of "Hair".

13. Plaintiff would show this Court, in light of the allegations above, that the plaintiff be granted a hearing as soon as possible in order to secure a Preliminary Injunction and preserve the booking dates of November 23, 1971, through November 28, 1971, and until a hearing upon the merits herein. Plaintiff would show this Court that a Preliminary Injunction should be issued upon the

same facts and giving the same relief until such hearing on the merits is had.

[7] 14. Plaintiff would further show the Court that a Permanent Injunction should be issued, upon full and final hearing and disposition of this cause, enjoining the defendants from interfering with the booking and preparation of the production "Hair", and that the defendants be mandatorily enjoined to reserve for the use of plaintiff or to contract with plaintiff for the use of the Tivoli Theatre facilities during the period from November 23, 1971 through November 28, 1971, for various presentations of the theatrical production "Hair"; that the Board of Directors of Memorial Auditorium of Chattanooga be mandatorily enjoined to restrain their employees, agents, officers, servants, and attorneys from harassing, interfering with, embarrassing, or in any wise obstructing the stage production of "Hair".

PREMISES CONSIDERED, plaintiff prays that a date be set for hearing upon its Motion for Preliminary Injunction, that citation issue upon the terms and conditions set by this Court, that such date be as soon as possible, and that upon a hearing of said motion, a Preliminary Injunction issue against the defendant Board of Directors of Memorial Auditorium enjoining them from scheduling or booking any stage production or activity or otherwise encumbering the Tivoli Theatre during that period of time from November 23, 1971 through November 28, 1971, pending a hearing on the merits herein.

Plaintiff further prays that this cause be set for hearing on the merits, and that upon hearing thereon, this Court declare and decree that:

1. That the production of "Hair" contemplated and sought to be scheduled for showing at the Tivoli

Theatre of the City of Chattanooga is an expression protected by the First and Fourteenth Amendments to the Constitution of the United States;

2. That the production, as aforesaid, does not violate any city ordinance nor is the same subject to the demnitions given to the term "obscenity".

Plaintiff further prays that at such hearing a permanent injunction issue enjoining the defendants from interfering with the booking and presentation of the musical stage play, "Hair", by the plaintiff corporation on the dates referred to above; enjoining defendants mandatorily to reserve for the use of the [8] plaintiff corporation or to contract with the plaintiff for the use of the appropriate Tivoli Theatre facilities during the period mentioned above, from November 23, 1971, through November 28, 1971, upon normal, standard and customary terms and conditions for like performances of musical stage plays; and further enjoining defendants, their agents, representatives, employees, agencies, city bodies subject to their control or attorneys from interfering with, harassing, or obstructing in any manner whatever the stage production of "Hair".

Plaintiff further prays for such other and further relief as would seem meet and just to this Court.

Respectfully submitted.

JOHN ALLEY
5th Floor, Maclellan Building
Chattanooga, Tennessee
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

MOTION TO DISMISS

(Filed November 22, 1971)

Come now the defendants and, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, move the Court to dismiss the Complaint and all relief sought thereunder on the following grounds:

1. The Complaint fails to state a claim upon which relief can be granted because:

a.) No Constitutional right of the complainant or its employees has been violated and it has no standing to bring suit to have others' constitutional rights determined;

b.) Defendants have no duty to lease the Tivoli to complainant nor does complainant have any "right" to such a lease;

c.) Complainant is not entitled to contract with the defendants because it has averred acts will be performed on stage which violate Sections 25-28 and 6-4 of Part II of the Code of the City of Chattanooga and the common law of Tennessee on indecent exposure and thereby the terms of the very lease it is seeking will be violated; and,

d.) The complainant, not being a natural person, does not have a right to bring this action in this Court.

[2] 2. The Complaint fails to state a substantial federal question or constitutional issue.

In support of this motion, and as an exhibit hereto, but not for copy, there is attached a copy of the transcript of the sworn testimony in the preliminary hearing in this cause.

Respectfully Submitted,

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON,
Special Counsel

400 Pioneer Building
Chattanooga, Tennessee 37402
265-2291

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

ANSWER

(Filed March 31, 1972)

Come now the defendants in this cause and pursuant to the Court's Order of March 23, 1972, and without waiving any of the defenses raised in their Motion to Dismiss, but relying specifically thereon, for further answer to the Complaint heretofore filed against them in this cause, aver they have the following defenses:

I.

Defendants aver that the matter at hand is a contractual one and that because the plaintiffs will not abide by the terms of the standard agreement regarding compliance with all of the laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga, the defendants have no duty or even right to contract with plaintiff.

II.

Defendants aver that plaintiff is not entitled to contract with them because it will have conduct performed on stage which, because of the public nudity, indecency, obscenity and incitement to crime involved, is in violation of the following ordinances and laws:

1. Sections 25-28, Part II of the Code of the City of Chattanooga;

[2] 2. Sections 6-4, Part II of the Code of the City of Chattanooga;

3. Sections 2-38, Part II of the Code of the City of Chattanooga;

4. Tennessee common law on indecent exposure;
5. Tennessee common law on gross indecency and lewdness;
6. Tennessee Code Annotated 39-3003; and
7. Tennessee Code Annotated 39-1013.

III.

Defendants deny that plaintiff's "Equal Protection" rights are being denied because they have never knowingly leased the premises in question to any party who, to their knowledge, was going to use said premises for the display of public nudity and other illegal and immoral activity.

IV.

Defendants deny that plaintiff's First Amendment rights are being violated because the First Amendment does not protect conduct which is contrary to valid state law upholding a substantial state interest.

V.

Defendants deny that plaintiff's First Amendment rights are being violated because the First Amendment does not protect obsence language or conduct such as that which plaintiff is seeking to exhibit to the public, and particularly, where it makes little or no effort to forewarn the public of the lascivious and salacious acts to be presented.

VI.

Defendants aver that granting a lease to plaintiff would be contrary to their standing policy of leasing the premises only for clean, healthful entertainment which will make for the building of a better citizenship.

[3]

VII.

Defendants would further show that because of the above violations of the law, the players may be subject to arrest

by the proper authorities and be unable to complete their performance, which may, as it has here in the past, incite a public disorder and/or riot, causing personal injuries and property damage.

VIII.

Defendants further aver that they are without power to lease the premises to the plaintiff, for its averred purpose, and any such lease would be void under the terms of Tennessee Code Annotated 39-3004.

IX.

Defendants aver that plaintiff is not entitled to contract with them because it will permit acts of desecration of the United States flag to be performed on stage in violation of Tennessee Code Annotated 39-1601 et seq., 18 U.S.C.A. 700, 36 U.S.C.A. 175, and 36 U.S.C.A. 176.

X.

In response to the factual allegations of the Complaint, defendants say:

1) They are without knowledge sufficient to form a belief as to the truth of plaintiff's existence or place of business.

2) They admit the allegations of Section 2 of the Complaint except that they would show that any contract involving liability on the part of the City must have the approval of the Board of Commissioners.

3) They are without knowledge sufficient to form a belief as to whether the amount in controversy exceeds the [4] sum of Ten Thousand Dollars ($10,000.00); they deny that plaintiff has standing under 42 United States Code Annotated to bring this action for the reason stated in Section 1(d) of the Motion to Dismiss and they deny that plaintiff is entitled to declaratory relief because: (1) it

has not made all interested parties (e.g. the actors) parties to this action and defendant could be subjected to a multiplicity of suits and the "controversy" not be terminated; and, (2) because as stated in Section 1(a) of the Motion to Dismiss, plaintiff has no standing.

4) They deny the allegations of Section 4 of the Complaint.

5) They admit the factual allegations of Section 5 of the Complaint.

6) They deny the allegations of Section 6 of the Complaint and aver that they are properly vested with discretion to admit or deny access to the premises in question based upon economic considerations, activity to be performed, character of the applicant, availability of dates, legality of proposed activities, and innumerable other valid considerations which any theater's management must consider before leasing similar premises.

7) They deny that they determined that "Hair" could not be played in Chattanooga, and aver that they only determined it could not be played at the Tivoli or Memorial Auditorium.

8) The defendants are without knowledge to form a belief as to the factual allegations in Sections 8, 9 10 of the Complaint.

9) They deny the allegations in Section 11.

10) Defendants aver that by amending their Complaint to ask for the Memorial Auditorium instead of the Tivoli, which [5] plaintiff originally said was the only suitable facility, acoustically, etc., plaintiff has demonstrated that its sole concern is crassly commercial and not the effective presentation of any issues or ideas protected by the First Amendment.

11) All other factual allegations not hereinbefore admitted, denied or explained are herein now denied as though individually set forth and specifically denied.

12) Defendants aver that plaintiff is not entitled to any relief.

Wherefore, defendants ask that they be dismissed with their reasonable costs.

EUGENE N. COLLINS
City Attorney

RANDALL L. NELSON
Special Counsel

400 Pioneer Building
Chattanooga, Tennessee 37402

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

(Filed April 6, 1972)

TESTIMONY OF ROBERT CHERIN
DIRECT EXAMINATION

BY MR. ALLEY:

• • •

[4] Q Were you advised that the board once again rejected your attempt to rent the theater?

A Yes, sir.

Q Now, in your capacity as president of the plaintiff corporation, tell this Court what commitments, if any, you have made to bring this play into the City of Chattanooga?

A We've committeed available time in the billing to bring Hair here from Spartansburg, South Carolina, and move it on to Austin, Texas.

Q Now, are dates after this particular date in question, is the production booked up on dates after this?

A Yes, it moves west from Austin into —

Q (Interposing) How far in advance do you have bookings?

A Well, for the most part I would say four to six months.

Q Is there any logical — or any method you could tell how long a stage production such as this will remain popular?

A Well, it's usually season by season. You can tell somewhere early in the theatrical season, that running from September till May, somewhere around October or November, you can get some good idea of how strong you're

going to be that season. To forecast beyond that, I think, is very difficult.

• • •

CROSS EXAMINATION

BY MR NELSON:

• • •

[6] Q This request then was made no longer than the one month before the time that you wanted to put the program on?

A Yes, sir, this specific one.

Q Now, in your complaint you've also alleged that upon information and belief the production of Hair does contain some nudity within it, is that not correct?

A Yes, sir, it does contain a nude scene.

Q Who appears on the stage nude in this play?

A The players.

Q How many players?

A The maximum is 28. That's the maximum number of people in the company.

Q How many appear nude on the stage at the same time?

A Well, the normal procedure is that everybody does. However, I must explain that every performer, every night, is given the choice, I mean there's no contractual obligation so that we cannot guarantee the number of nude players during that scene. It's a, you know, somewhere between six and 35 seconds, [7] subdued light, standing completely still in this scene.

Q I see. Now, does this include both males and females on the stage?

A Yes, sir.

Q You say subdued light; is it not true that there is psychedelic lights flashing on the players at that time?

A There are two bright lights, yes, sir.

Q What is the purpose of this nudity?

A It denotes to the generation that Hair depicts, freedom and rebirth.

Q Are you aware of a Chattanooga City Ordinance which forbids public nudity?

A Yes, sir, I am.

Q Are you aware of the standard lease of the City of Chattanooga Auditorium Board that all ordinances of the City of Chattanooga be conformed with?

A I assume it means applicable ordinances.

Q You don't think this ordinance would apply?

A No. I don't believe, you know, that Hair is a show which includes the nude scene, this has been held by four different courts to be not obscene.

* * *

TESTIMONY OF STEVE CONRAD

DIRECT EXAMINATION

BY MR. NELSON:

[25] Q Will you state your name and position, for the record, sir?

A Steve Conrad, Commissioner of Public Utilities, Grounds and Buildings for the City of Chattanooga, Tennessee.

Q As Commissioner of Public Utilities, Grounds and Buildings, you are chairman of the Auditorium Board, is that not correct?

A That is correct.

Q I believe Mr. Alley has plead Section 2-238 of the City Code. Under that, under Section 2-238, the board of directors of the Chattanooga Auditorium Board shall

have complete control and entire management of the Chattanooga Memorial Auditorium and shall make and by a majority vote of the board, approve all contracts pertaining to the maintenance, upkeep, use and operation of the auditorium, provided that any contract involving the liability on the part of the city shall have the approval of the board of commissioners.

You're the chairman then of this board that's been [26] set up by this particular ordinance?

A Yes, I am by virtue of my office.

Q Now, can you tell us, Commissioner Conrad, does the auditorium board have a policy on what productions are allowed to be presented at the Tivoli Theater and the Auditorium?

A There has been, as I understand it, an unwritten policy of longstanding that was taken from the original auditorium board dedication back in 1924. Basically, since I have been associated with the board, the past four and a half years, this is the first instance where we have denied the use of this particular facility to anyone. We use the general terminology in turning down the request for its use that we felt it was not in the best interest of the community and I can't speak beyond that. That was the board's determination.

Now, I would have to speak for myself, the policy to which I would refer, as I mentioned, basically indicates that we will, as a board, allow those productions which are clean and healthful and culturally uplifting, or words to that effect. They are quoted in the original dedication booklet of the Memorial Auditorium.

Q Did you bring that dedication booklet with you?

A Yes, I have it here.

Q Would you make it an exhibit to your testimony, please?

[27] A Yes.

(Thereupon, the above referred to booklet was marked Exhibit No. 2 for identification and received in evidence.)

THE WITNESS: The section I refer to or page I refer to is Page 40. The auditorium, its operation and management, and the phrase I'm referring to, without reading the entire thing, states that it will not be operated for profit and – but the actual operating expenses will be permitted and this phrase, if I may underline it verbally, instead, its purpose will be dedicated for clean, healthful entertainment which will make for the building of a better citizenship.

Q What familiarity do you have with the stage production Hair?

A I have not seen it. I have talked with persons who have seen it. I have read a number of reviews of the production. I have heard RCA Victor's album of the songs in the production.

Q What is your information as to whether it meets the standard that you have applied to productions seeking to gain entrance to the Tivoli?

A I can personally not understand how nudity and offensive language which violate two city ordinances that I know of can possibly be considered clean and healthful entertainment.

[28] Q Has anyone on behalf of the plaintiff presented you with any information demonstrating it to be such clean and healthful entertainment?

A No.

Q To your knowledge has the auditorium board ever allowed the production at either the auditorium or the Tivoli Theater where public nudity was involved?

A Not to my knowledge, not since I've been on the board.

Q Have these facilities ever been closed to minors and children?

A Not to my knowledge.

Q As Commissioner of Public Utilities, Grounds and Buildings, are you acquainted with any other facilities in the city which could perhaps house this production?

A Oh, there are probably a number of private facilities, if that's what you're talking about.

Q Yes; could you name some of them?

A I don't know the technical ramifications, what would or wouldn't be required, but it seems to me that any kind of stage play could be put on at the Chattanooga Little Theater, which is a privately-owned organization. I would also make the assumption, since stage plays of various kinds are put on at a theater whose name has changed several times off Lee Highway, I think it's called the V.I.P. Theater now, [29] but don't hold me to that. It used to be the Old West Dinner Theater. I think it may even have been called the Barn Theater. I'm not sure of that.

If you're talking about just size, I would also imagine that you could put on a play and I'm certain I've seen one musical production at Maclellan Gymnasium.

Q Have you denied access to any of these or do you have any authority to do so?

A I have no authority.

Q Has the board at any time threatened prosecution against the producers of this production?

A Never.

Q Do you have with you a copy of the standard lease of the auditorium and the Tivoli Theater?

A Yes, sir, I have.

Q Would you make it an exhibit to your testimony, please?

THE COURT: Exhibit No. 2.

CLERK FRANKLIN GLASS: Three.

THE COURT: Three?

CLERK FRANKLIN GLASS: Your Honor, the program is two.

(Thereupon, the above referred to lease was marked Exhibit No. 3 for identification and received in evidence.)

BY MR. NELSON:

[30] Q Does it make reference to the city ordinances in there?

A Yes, sir

Very well. Item No. 1, it's a complicated sort of thing on what I would say is Page 2 of this lease, these words are stated, "This agreement is made and entered into upon the following expressed covenants and conditions, all and everyone of which the lessee hereby covenants and agrees to with the lessor to keep and perform; that said lessee will comply with all laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga and all rules and requirements of the Police and Fire Departments or other municipal authorities of the City of Chattanooga, et cetera, et cetera", ad infinitum.

MR. NELSON: At this time, Your Honor, I would like to read into the record the Chattanooga City Ordinances which we feel would be violated.

Section 25-28 of the Code of the City of Chattanooga provides that "It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any

bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place."

Section 6-4 of the City Code, Part 2, provides [31] "That it shall be unlawful for any person to hold, conduct or carry on or to cause or permit to be held or conduct any motion picture, exhibition or entertainment of any sort which is offensive to decency or of an immoral nature or so suggestive as to be offensive or indecent or which is calculated to incite a crime or riot."

You may ask him.

CROSS EXAMINATION

BY MR. ALLEY:

Q Commisisoner, does the board approve every contract?

A No, we have over a long period of time delegated the authority to enter into contracts under certain policy provisions to the auditorium manager.

Q Who would that be, sir?

A Clyde Hawkins.

Q Is Mr. Hawkins here?

A He's seated there.

Q I believe Man of La Manchu played here?

A I beg your pardon?

Q Man of La Manchu?

A Man of La Manchu, yes.

Q Did the board approve that or Mr. Hawkins?

A No, it wasn't brought to the board's attention.

Q Would you explain to me what is clean and healthful about the rape scene in this particular play?

[32] A I don't know whether there was a rape scene or not.

Q You weren't aware of that?

Promises, Promises, was this approved by the board?

A No, it wasn't.

Q Would you explain to me what is clean and healthful about the multitude of adultery that is portrayed in this production?

A I saw the production, there is the insinuation of adultery, there was no nudity, there was no offensive language as I said, over the insinuation that things were going on.

Q But under your standard it was clean?

A It's not important what my standard is, it's what the board and the auditorium manager with the concurrence of the board determines.

Q I believe this theater has played Company, has it not?

A I am sorry, Mr. Alley, I didn't understand you.

Q The stage production Company.

A Company

Q Yes.

A I am not familiar with it.

• • •

[10] THE COURT: Very well. All right. You will be permitted to make an opening statement. I would suggest you keep your opening statement brief in view of the limited issue in the case.

Now, the City of Chattanooga has made reference to certain ordinances which you did not set forth in your answer but merely cite. Of course, the Court cannot take judicial knowledge of the municipal ordinance unless the parties can stipulate upon that. Can a stipulation be made with regard to those ordinances?

MR. COLLINS: If Your Honor please, they were

stipulated at the earlier hearing and for that reason I didn't think there would be any necessity for that. I feel that – sure that counsel would be willing to stipulate them now.

MR. ALLEY: It was my understanding that everything that occurred on November the 4th is in the record and can be used for any purpose.

THE COURT: Is that agreeable to counsel for each side, that –

MR. COLLINS: (Interposing) Yes, your Honor.

THE COURT Testimony in the previous trial may be used as evidence in the trial in this case?

MR. COLLINS: Yes.

MR. ALLEY: Yes.

• • •

[12] MR. NELSON: Excuse me, Mr. Alley, I will furnish you with one right now.

MR. COLLINS: Sorry about that.

MR. ALLEY: Your Honor, we have entered into a stipulation of fact which would relate to this issue.

MR. COLLINS: If your Honor please, if it's appropriate, we have agreed to stipulate that the production known as "Hair" has played in over 140 American cities and that the production of "Hair" that is planned to be presented in Chattanooga at the auditorium involves the same stage conduct and language used everywhere else.

MR. ALLEY: I would only add one phrase there, essentially the same.

THE COURT: What does the word "essentially" mean?

MR. ALLEY: Well, your Honor, we, of course, there might be some minor – for example, in 1968 when the play was first performed, there were take-offs on references to LBJ. Well, at some subsequent time, these references were changed to Richard Nixon.

THE COURT: Well, the word "essentially" makes the stipulation so vague and uncertain that it would eliminate the value of any – if you can agree upon, in what particulars –

MR. COLLINS: (Interposing) On this statement, [13] based on that statement, that is not correct other than some very insignificant, minor changes, such as Richard Nixon this company used, yes.

THE COURT: Restate your stipulation, now.

MR. COLLINS: Involves the same stage conduct and language as has been used everywhere else.

THE COURT: Is that an agreeable stipulation?

MR. COLLINS: With us both understanding that there are certain very minor differences that would relate to the name of the President and a few things like that.

MR. ALLEY: And in accordance with the libretto, which has been furnished in accordance with Rule 24 to opposing counsel and they have a copy of same.

THE COURT: Let's have that libretto identified, Exhibit No. 1 for identification.

(Thereupon, the libretto referred to above was marked Exhibit No. 4 for identification.)

MR. ALLEY: Would it be four?

THE COURT: Exhibit 4 for identification.

MR. ALLEY: Think there were three exhibits in the initial proceedings.

THE COURT: All right. And that libretto can be stipulated into evidence in this case?

MR. ALLEY: Yes, sir.

• • •

TESTIMONY OF STEVE F. CONRAD

DIRECT EXAMINATION

BY MR. COLLINS:

[20] Q State your name for the record, please.

A Steven F. Conrad.

Q And your position with the City of Chattanooga?

A Commissioner of Public Utilities, Grounds and Buildings.

Q And your position on the Auditorium Board?

A By virtue of the previous office, I am chairman of the board.

• • •

BY MR. NELSON:

[24] Q Now, on Page 1-6, Commissioner, there is a scene where a microphone is placed somewhere. Do you recall that scene?

A I recall the scene. I don't – it occurred early in the performance. The character Berger is reclining center stage on his back using what appears to be a red microphone which he places in an upright position simulating his penal organ and he simulates masturbation.

Q Did you see any relevancy of some of these physical acts and conduct on stage to any theme in the plot?

A No, I didn't.

Q Did these acts and conduct appear to be irrelevant to any supposed theme?

A Yes, they did.

Q Now, Commissioner, with reference to Page 1-11 of the script, was there a scene where posters were brought upon the stage with different signs lettered on them?

A Yes, there were approximately a dozen or so.

THE COURT: What page are you referring to?

MR. COLLINS: 1-11.

Q What were some of the things that were on these signs as you recall?

A Well, the script indicates one of them which [25] reads, "LAY DON'T SLAY." I don't remember the wording on most of them except one which, let's see, it was a lengthy phrase but the word "fucking" was on it.

Q Now, with reference to Page 1-12, would you describe to the jury what the players were doing while singing about copulating in a king-sized bed?

A I don't recall if this was the exact scene because the incidents occurred frequently. Let me explain a general recollection. I don't know whether it pertains to this particular scene.

Q All right.

A There was frequent simulated sex activity between males and females in groups of two, in groups of three, in groups of four and in one instance five persons were indulging in what seemed to me to be an unnatural act.

The simulated sexual activity is not just the proximity of male and female body. In almost every case that I recall the male, if it was a frontal or a rear position that he was approaching the female, simulated the thrust, the repeated thrust of the penal organ.

• • •

[27] Q In connection with that scene, would you read the language that is forcibly said on stage attributed to Claude on 1-27, center of the page.

"CLAUDE

"That's all right. I have thought it over – I'll tell them I'm a faggot and hide out in Toronto. Shit. I'm not going in. I'll eat it first. I'm not.

"WOOF

"Eat what?

"CLAUDE

"My draft card."

Q Then read the one attributed to Berger at the bottom of the page.

A "Dance bare assed," then my script says, "through local department store." I don't remember what they said.

Q Now, with reference to 1-35 –

A (Interposing) Could we go back to 1-29?

• • •

[33] Q You do recall the scene?

A Yes, yes, Jeanie, if I remember, is the pregnant one.

Q About the glories of heroin use and marijuana and pot –

A (Interposing) Yes.

Q – you recall one scene where they were all purportedly on stage to give each other shots in the arm?

A I honestly don't recall that, no. They may well have been.

Q Now, after having been so entertained during the first act, Commissioner, describe for the jury the manner in which the first act ends.

A There is a musical number, I can't give you any description of it because in –

Q (Interposing) There is music all through it?

A Yeah, there's a musical number and in the course of the number, an enormous, either blanket or piece of canvas, I couldn't tell which, is stretched out over the stage and perhaps a dozen, maybe more of the actors, male and female, get under the blanket or canvas; and in the course of the number, they reappear, nude.

Q And do these men and women completely nude stand [34] there on stage and sing for a while?

A They stood there. I didn't know if they were singing.

Q Commissioner, what was your personal reaction after having seen the whole performance, what was your reaction at that time?

A These simulated sex acts disgusted me.

Q Commissioner, would you take your family, your mother, your sister, or your preacher, would you take these people to see this play?

A No, I wouldn't.

Q To what human interest or animal instincts does the play appeal or tend to satisfy?

MR. ALLEY: Your Honor, I would object to that question.

Q I will rephrase it to what animal instincts does this play appeal?

A It seems to me, sex.

Q Was the play offensive to your concept of public decency?

A Yes, it was.

Q Now, you have read the script that was furnished us and you have seen the play. Does the performance, the conduct tend to deviate from the script in any respect?

A Frequently.

• • •

[68] MR. RAULSTON: (Interposing) Your Honor, we are going to object unless it's in the libretto, for him editorializing or saying anything that is not in the script.

THE COURT: Well, he can say what he saw. If he saw the production itself, he can say what action he saw.

A This was the place in the script that I testified earlier

where Claude came around in the process of — in the course of the dialogue when he blessed various people, he touched the breast of this young woman, went back and touched her other breast in the process of blessing her.

"BERGER

"Hey, let's have some more rock and roll music: one, two, three, four,

"(Five is silent. BERGER, WOOF, HUD and entire TRIBE run over to greet CLAUDE)

"TRIBE

"Claude . . . Claude . . . Claude.

"BERGER

"Wait . . . wait, wait . . . don't tell us.

"WOOF

"Did you pass it?

"HUD

"Are you physically fit?

"(Claude nods 'yes')

"WOOF

"No kidding.

"BERGER

"That's death body man . . .

[69]

"HUD

"Tough luck baby.

"CLAUDE

"That's all right. I've thought it over — I'll tell them I'm a faggott and hide out in Toronto. Shit. I'm not going in. I'll eat it first. I'm not.

"HUD

"Eat what?

"CLAUDE

"My draft card.

"BERGER

"I thought you burned it.

"CLAUDE

"That was my driver's license.

"WOOF

"Eat it on the galloping gourmet.

"CLAUDE

"Berger, help me, how am I gonna get out of going?

"BERGER

"Dance bare assed through 'local' department store.

"CLAUDE

"C'mon, what am I gonna do?

"BERGER

"Take me with you, tell them I'm your girlfriend and you can't sleep without me."

At that point in the script, two males, one jumps on top of the other, I don't know which was which —

MR. RAULSTON: (Interposing) Your Honor, again we would object for the record, if it's not in the libretto and as he says, he doesn't know.

[70] THE WITNESS: I know they were two males. I don't know which male was on top of the other one.

THE COURT: He can testify what he saw.

THE WITNESS: The two males, at this point, one jumped on top of the other and the one on top simulated sex action of some kind with the one on the bottom.

"HUD

"Tell them your mother volunteered to fight in your place.

"WOOF

"Do they know she's a green beret?

"CLAUDE

"I want to be over here doing the things they're over there defending.

"WOOF

"Become a nun.

"HUD

"Wet the bed, baby.

"CLAUDE

"(He starts to burn draft card)

"They're not gonna get me. That's it, they're not gonna get me.

"BERGER

"(Reading over his shoulder)

"Mr. Claude Hooper Bukowski — New York Public Library.

"(They blow out the card)

"CLAUDE

"Now I can't even get a book out. Berger, if I go, I'll get killed or a leg shot off or something . . . I know it . . . they're not gonna get me.

"BERGER

"Oh yes, they are. You will go, and you will loot, rape, and kill . . . you will do exactly what they tell you to do.

• • •

[79] MR. ALLEY: (Interposing) Your Honor, I object if he doesn't remember.

THE WITNESS: There was a scene where five males in apparently simulated indulgence with her.

MR. ALLEY: If that's not the scene he is reading from right now –

THE COURT: (Interposing) He can testify as to his observations that he made of the play, his best recollection as to their location with the script.

THE WITNESS: The scene to which I just referred, the character Sheila, with simulated sexual activity on the part of either Claude or Berger first, then Claude in a front to back position. This was all standing as – yeah, it was standing. Then Claude in a front to back position with the other male, then a third male joined that activity and then a fourth male joined whereupon the female character said, "And I want to thank that last guy."

SHEILA

"Isn't love beautiful? I live in the East Village with these two magnificent beasts. Claude, the purest mind on Avenue C.

"BERGER

"Mama mia, that's some – a spicy meatball.

"SHEILA

"And Berger, the grooviest ball on Avenue B.

• • •

[89]

"BERGER

"No. No. Stop . . . Don't . . . Stop!

"(She gets raped by WOOF. WOOF and STEVE exit)

"No – come back here young man. Where are the police

in this city? It's disgusting. A woman could get ravished out here. She can. She can.

"(Two attendants with a stretcher run on stage to 'rescue' BERGER, and also pantomime a second rape. Then they carry BERGER off, as he says:)

"I am going back to Fire Island!

"(The TRIBE runs into the audience with pamphlets inviting people to come to the be-in. JEANIE and CRISSY remain on stage.

"TRIBE

"Come to the B-in! Come to the Be-in!

"JEANIE

"Dig it, people, I'm tripped, high, zonked . . .

"HUD

"See the hippies get busted . . .

"JEANIE

"Stoned . . .

"HUD

". . . by the New York City Police.

"JEANIE

". . . right here, right now . . . in this theatre

"PAUL

"See them smoke marijuana, the killer weed.

"JEANIE

"I've had every drug going except some jungle vines somewhere.

• • •

[97]

"CLAUDE

"WHERE DO I GO
"FOLLOW MY HEARTBEAT
"WHERE DO I GO
"FOLLOW MY HAND
"WHERE WILL THEY LEAD ME
"AND WILL I EVER
"DISCOVER WHY I LIVE AND DIE

"TRIBE

"WHY

"CLAUDE

"I LIVE AND DIE

"TRIBE

"WHY

"CLAUDE

"WHY DO I LIVE
"WHY DO I DIE
"TELL ME WHERE DO I GO
"TELL ME WHY
"TELL ME WHERE
"TELL ME WHY
"TELL ME WHERE
"TELL ME WHY

"TRIBE

BEADS FLOWERS
FREEDOM HAPPINESS
BEADS FLOWERS
FREEDOM
HAPPINESS
BEADS
FLOWERS
FREEDOM

"(A siren sound effect is heard at the end of the song.)"

I almost forgot, that was the song where, as I testified earlier, during the course of this song, the cast of ten or twelve, at least, fourteen, maybe, go under this tent-like thing that's stretched across the stage, undress and they emerge, male and female, naked, until the conclusion of the song. Then the siren effect is heard at the end of the song.

• • •

[107]

"AND I WENT CLEARLY CRAZY
"BECAUSE I REALLY CRAVED FOR
"MY CHOCOLATE FLAVORED TREATS

"TRIO

"BLACK BOYS ARE NUTRITIOUS
"BLACK BOYS FILL ME UP

"BLACK BOYS ARE SO DAMN YUMMY
"THEY SATISFY MY TUMMY

"I HAVE SUCH A SWEET TOOTH
"WHEN IT COMES TO LOVE

"BLACK BLACK BLACK BLACK BLACK BLACK BLACK BLACK
"BLACK BOYS

"(THREE BLACK GIRLS, appear in exaggerated blond wigs, and dressed very brightly, a la Supremes)."

During the course, this is parenthetical, during the course of this song, I believe I testified earlier to this effect, the girls are in an elevated platform and there are three males down below the platform lying on their backs facing the girls and throughout the song the males go through the

gyrations of the thrusting that is accompanied by the sex act.

"SUPREMES TRIO
"WHITE BOYS ARE SO PRETTY
"SKIN AS SMOOTH AS MILK
"WHITE BOYS ARE SO PRETTY
"HAIR LIKE CHINEST SILK

"WHITE BOYS GIVE ME GOOSE BUMPS
"WHITE BOYS GIVE ME CHILLS
"WHEN THEY TOUCH MY SHOULDER
"THAT'S THE TOUCH THAT KILLS

• • •

[109]

"BERGER
"Hud, Let's lock up.

"BLAKE
"Now folks, it's turney-oney time.

"MARC
"Ladies and gentlemen. This portion of Hair is brought to you by marijuana, nature's little way of saying, Hi.

"BRUCE
"You know Doug. This dope just isn't as good as it used to be.

"DOUG
"Here, try one of mine.

"BRUCE
"You're right. This is two, two, two hits in one.

"TONY
"Relieves headaches fast! Fast!

"JOYCE
"Marijuana. It's not a question of hi, how are you, but how high are you.

"BERGER"

The words simply say, "Fly United," but as – before Berger utters those words, he crosses the stage from one side of the stage to the other – I don't know which is left or right – a girl – a woman is in front of him. He is in close proximity to her. He is going through the motions I described a while ago with the male genitals in the buttocks of the female and he says, "Fly United."

• • •

[117] "(They dance a minuet, with CLAUDE trying to follow the steps. They are attacked by three African witch doctors, in masks, with spears, wearing Dashikis. CLAUDE crouches off to the side)

"AFRICANS
"WALLA WALLA
"GOONA GOONA!!!

"LINCOLN
"Oh, my God, niggers!

"(AFRICANS kill the people on stage and remove their masks)

"HUD
"Wait a minute. I don't think I see no niggers. Boys, did you hear what that fool called us?

"TWO BOYS
"Us, hell! She was talking to you.

"HUD

"(To audience)

"What's so damn funny out there. You jive white mothers are always running around calling somebody some kind of name. Like . . . niggers!

"(They remove Dashikis)

"HUD

"I oughta harpoon your ass.

"LINCOLN

"Hey, wait a minute, snowflake, I'm one of you, baby.

"HUD

"No. Shit. Well, what 'yo doing here?

"LINCOLN

"Would you believe takin' a suntan?

"HUD

"Never mind.

"(He knocks LINCOLN down, takes off his Dashiki)

• • •

[129]

"SONG SONG SONG SING
"SING SING SING SONG

"SONG SONG SONG SING
"SING SING SING SONG

"(Four boys drag an old mattress on stage)

"THE TRIBE"

They are also, at this point, when the mattress appears, some gestures on the part of some of the male members of the cast; again, the gesture, I have difficulty in describing the simulated thrust of the male organ.

"THE TRIBE

"(This song starts as a chant)

"UUUUUUUUUUUUUUU THE BED
"AAAAAAAAAAAAAAA THE BED
"UUUUUUUUUUUUUUU THE BED

"OH THE BED
"MMMMM THE BED
"I LOVE THE BED

"YOU CAN LIE IN BED
"YOU CAN LAY IN BED
"YOU CAN DIE IN BED
"YOU CAN PRAY IN BED

"YOU CAN LIVE IN BED
"YOU CAN LAUGH IN BED
"YOU CAN GIVE YOUR HEART
"OR BREAK YOUR HEART IN HALF IN BED

"YOU CAN TEASE IN BED
"YOU CAN PLEASE IN BED
"YOU CAN SQUEEZE IN BED
"YOU CAN FREEZE IN BED

"YOU CAN SNEEZE IN BED
"CATCH THE FLEAS IN BED

• • •

[135]

"LET THE SUNSHINE
"LET THE SUNSHINE IN
"THE SUNSHINE IN

"LET THE SUNSHINE
"LET THE SUNSHINE IN
"THE SUNSHINE IN

"(During curtain calls, audience is encouraged onstage to dance with cast)

Q Commissioner, just two last questions, perhaps, you have used the phrase "simulated sex acts" performed on stage frequently. Would you tell the jury in your own words what you mean by "simulated sex acts"?

A A sex act performed with clothing on.

Q But in the necessary, close, physical proximity?

A The close, physical proximity and the identical movements.

Q In other words, the bodies were together?

A Completely.

Q To your knowledge, has public nudity ever been allowed on the stage of the Auditorium or the Tivoli?

A No, it never has.

Q And to your knowledge, has scenes acting out various sex acts ever been allowed on the stage of the Auditorium or the Tivoli?

• • •

CROSS EXAMINATION

BY MR. ALLEY:

• • •

[140] Q I beg your pardon?

A Third, the nudity.

Q You say you were repulsed?

A Yes, I had never seen anything like that on stage before and I frankly hope I never do again.

Q So it didn't appeal to you, then?

A No, it didn't appeal to me.

Q What portions, very briefly, did you consider obscene, if you can summarize?

A Did I consider obscene?

Q Yes, sir.

A The – I think I testified to the majority of them, not by specific instance, as best I can recall from the reading of the script – you want me to review them again?

Q Briefly, yes, sir.

A May I refer to my notes?

Q Yes, sir.

A I believe I said earlier that there was frequent instances of simulated sex acts involving one male and one female, involving several males and several females on stage at the same time in face-to-face relationship while standing, while on the floor; some cases the male was astride the female, some cases it was vice versa; frequent instances of male to female proximity, front to back with the male facing the posterior of the female with what I call, I think for [141] lack of a better term, thrusting movements of the male organ into the posterior of the female; male to male simulated sex acts in both attitudes, face to face, front to back; simulated masturbation, several instances, one very flagrant one of simulated male masturbation with the use of a prop that appeared to be a red microphone with the male center stage, all attention focused on him, for he was the lead character in that sequence, with the microphone being substituted for the male penis;

Simulated acts involving several males and one female. This was a standing situation with one male in a frontal attitude toward the female and the other males in a posterior attitude, one to the other, that is face front to back – I don't know how else to describe it;

Several instances of females simulating a sex act with their mouths being in very close proximity to the male genitals; frequent – no, I shouldn't say frequent, that's inappropriate – that one particular instance to which I testified of the male lead, as I call him in the play, scratching

his own genitals; frequent instances of males grabbing other males' genitals – that's about the size of it, I think.

Q So, in summary, the portions that you found obscene were the, basically, the simulated sex acts?

A That's correct.

Q Now, did you find any portions of it enjoyable?

[142] A I enjoyed the last number, I enjoyed the opening number. I didn't enjoy it very much in between.

Q You say "very much"?

A I think the only other number that, if you want to use the word "enjoyment" that I felt was enjoyable was the air pollution number.

Q All right, sir. Moving more in terms of relevancy or in terms of attempting to say something, did any portions of the play come across to you in that manner?

A Yeah, there was some messages to be gained.

Q Would you summarize those, set those out?

A There was an obvious protest against the war which was highlighted by the closing number in particular. And, as I said, there was the satire on air pollution.

Q With respect to racism?

A There were instances where this was brought out, I don't know how effectively.

Q Well, did you feel like that the players were basically racists, that is, the characters they were portraying, or were they merely making fun of our society's views on race, showing our hypocrisy?

A I couldn't really answer that. I didn't feel they were racists and I don't think that was the intent of it; but I don't know what – I don't know them as individuals, Mr. Alley, consequently, I don't know where play acting [143] begins and where reality ends as far as they are concerned.

Q You couldn't tell whether they were actors or actually living this part, then?

A The program indicated they were nonprofessionals picked up off the street, whatever that may be; program also said that they believed in the sex attitudes they were depicting.

Q In relation to the sex attitudes, could it be possible that some of these acts or any of these acts or all of these acts that you have detailed here and obviously made notes on and so forth could be found in context of making a joke about sex?

A Again, I couldn't answer that, I don't know. It didn't appear to me to be along that vein.

Q Was it possible?

A Anything's possible.

Q Now, in all cases, I believe with the exception of the one brief scene where the players are standing still and the lights are dimmed to a great extent, very dim, the players throughout are clothed, is that not true?

A That's correct.

Q And we are here referring to the famous or infamous nude scene at the end of the first act, this is the only exception?

A That's the only scene in this play that I saw [144] where characters or participants were nude.

Q What kind of people were portrayed in that play? Who were these characters? Who were they portraying what loosely can be called the hippie generation? Did it have a setting?

A You mean for the stage itself, how was it set?

Q Well, I mean, did it say where this was taking place or anything?

A No.

Q Any of the musical words give you any indication?

A A lot of references to New York but I –

Q (Interposing) Are not some of the players black, some white?

A I am sorry, I didn't hear the question.

Q Are some of the players black and some white?

A Oh, yes, yes.

Q Some male, some female?

A Right.

Q But you definitely got the idea they were portraying the hippie element in our society?

A They were representative of that group is the way I would phrase it and they were attempting in their own way to portray certain conditions of life as they saw them, I suppose.

Q In portraying those conditions of life as they [145] saw them, would you not expect them to use some four letter words?

A I am afraid four letter words are part of the vocabulary, unfortunately, in some instances.

Q In talking to each other, if you heard them – overheard them on the street, it would not surprise you, would it?

A No, I have heard many of the words that have been used. I haven't hear them to this extent.

Q Were there any words in the play you have never heard before?

A No.

Q Now, you say the play did comment on the war and on sex and what about the draft?

A There was a good bit about that.

Q Pollution?

A Right.

Q Drugs?

A From their point of view, yes.

Q Hypocrisy, generation gap?

A These were included.

Q Now, with relation to drugs, I believe you testified at one point that there were some comments on marijuana, I believe, in direct testimony?

A I don't remember what my direct testimony was, [146] Mr. Alley. If you have a question, ask it; I will try to answer it.

Q My question, then, is the conclusions or the ideas expressed on marijuana by the actors in the play happen to coincide to a great extent with the conclusions of two presidential commissions on marijuana, do they not?

A I honestly don't know. I am not an authority on presidential commissions or marijuana of much of anything else.

Q But if I told you that presidential commissions –

MR. COLLINS: (Interposing) I object, he said he didn't know.

THE COURT: Well, state your question.

Q If I told you that the presidential commission on marijuana has recommended the abolition of criminal penalties for private use, would this, this fact, is it so brought out by the players? Is this, this idea generally advocated by the players in this play?

A I didn't get that impression.

Q Did you get the impression they were against marijuana use?

A No, no, on the contrary.

Q That they were for it?

A Yes.

Q And they thought criminal penalties were wrong?

[147] A I would presume – and it's only a presumption. I didn't get it from the play – that if you believe that marijuana should be used privately, you must there-

fore automatically believe that there should be no penalty unless you are a masochist of some kind.

Q It is basically an anti-war play, is it not?

A I don't know, basically, there is an anti-war element in it.

Q All right. It's anti-Vietnam war?

A That's correct.

Q And I believe that now this view is probably shared by the majority in this country, is it not?

A It would seem to be an accurate statement.

Q Okay. The same is true of pollution?

A Yes.

Q Now, Commissioner, you, of course, are not pretending to have any expertise in the theatre?

A No, I don't.

Q And you are basing your ideas and your opinions of this play on basically your own personal morality, is that not true?

A I suppose in essence, yes, I am simply saying that I have never seen the physical acts that were an integral part of this particular production on stage in a public place ever before.

• • •

[152] Q Who are the grate –

A (Interposing) Beg your pardon?

Q Who are the "grateful dead"?

A The grateful dead? I don't know.

Q Well, one of the songs mentioned "grateful dead."

A I didn't – first time I heard the lyrics, if it was in the song.

Q Is it possible that there were elements in this play that you missed, Commissioner?

A I said I didn't miss anything visually that I know of. You can't keep your eye on the whole stage at one

time. I have testified that many of the lyrics of the rock music my ears simply can't catch. I read the lyrics, I presume, out of this particular libretto, I think it's called.

Q So, it is possible that you missed quite a bit if you could not hear the lyrics?

A It's possible; let's say I couldn't hear the lyrics, I couldn't understand the lyrics. I heard a lot of noise.

Q You recall the song, "What A Blessed Work Is Man"?

A No, I don't. It's in here, I know.

• • •

[157] Q But you are not testifying, are you, Commissioner, that this play is utterly without redeeming social value?

MR. COLLINS: Object to that. That's a conclusion the jury is going to have to draw, may it please the Court. We can get witnesses here for every comment, one way or the other.

THE COURT: Sustain the objection.

A No, I can't say it – utterly no redeeming quality whatever – utterly means in its context – my problem with that word is like everybody else's problem with obscenity. What is it? What is it; not what is it not.

MR. ALLEY: Excuse me one second, Your Honor.

Q Commissioner, would you refer to your notes that you referred to previously and list the social issues that this play did comment on?

A I don't have those in my notes. You asked me a question about it. I mentioned the air pollution. I mentioned the Vietnam War. You mentioned race relations. I don't know, a few others here and there – the draft.

Q Your notes do not contain those?

A No, my notes contained only instances, as best as I

could recall a day after having seen the performance, of the simulated sex acts.

• • •

RECROSS EXAMINATION

BY MR. ALLEY:

• • •

[162] A formal vote was then taken not – to deny the booking. I believe the words used – the nudity was discussed briefly. It was not an in depth discussion if I recall. The nudity was discussed briefly. The language was discussed briefly. It was determined that the booking would not be made in the best interest of the public.

Q As a matter of fact, your obscenity defense was filed Friday the day before you went?

A I had no knowledge of what the defense was. I mean, I hadn't conferred with the attorneys, I didn't know.

Q The day before you went to Charleston on Saturday?

A If you say so, if the record shows that.

MR. ALLEY: Thank you.

THE COURT: Anything further of this witness? All right. You may be excused.

Gentlemen, I am going to have to recess the trial at this time. I have some other matters I must take up this morning. Accordingly, gentlemen, do not discuss this case; wouldn't be proper to discuss it among yourselves or discuss it with anyone or allow anyone to discuss the case with you.

Do not read or listen to any news account of the trial, bearing in mind at all times your obligation to decide [163] this case on the basis of the evidence that you hear in open court.

If the jury will be back at nine o'clock in the morning, we will resume the trial at that time. The jury may be excused.

(Thereupon, the jury was excused from open court, and in their absence, the following proceedings were had, to wit:)

THE COURT: Anything further, now, to take up, gentlemen, in the absence of the jury? If not, let's be in recess until nine o'clock tomorrow.

(Court adjourned.)

• • •

TESTIMONY OF WILKES T. THRASHER, JR.

DIRECT EXAMINATION

BY MR. COLLINS:

• • •

[165] Q Are you an attorney at the Chattanooga Bar?

A Yes, sir, I am.

Q How long have you practiced law, Mister –

A (Interposing) Approximately 24 years.

Q Recently did you have an occasion to see a stage production known as "Hair"?

A Quite by accident, Mr. Collins, I did about a year and a half ago, yes, sir.

Q In the interest of time, Mr. Thrasher, would you simply turn to the jury and tell them what you observed on stage with reference to sex acts, nudity and things of that –

MR. ALLEY: (Interposing) Your Honor, I would object to the form of that question.

THE COURT: Well, I believe the question is quite

general. Can you not make your questions more specific? Although, of course, Mr. Thrasher is an attorney and is aware of the rules of evidence and accordingly will be permitted more liberality than would normally be the case in the matter of addressing general questions.

• • •

[167] Then one of the actors took — the male actor took the American flag and, don't want to be indelicate, rubbed the rear end of his anatomy with the American flag. Then a female actress picked up the flag and did the same thing with the front part of her anatomy.

Shortly thereafter, I saw many simulated sex acts between the actors and the actresses.

Near the latter part, there was a nude scene but the flag and the sacrilege was the principal thing that I saw while I stayed. I left before the play was over.

Q You left after the first act?

A I believe the second act. They did not cut the lights on until then and — fully — and when the lights came on where I could get out without walking over people and disturbing them, I left, went back to the hotel and took a shower.

Q Did you see simulated sex acts that can be characterized as unnatural?

A Yes, sir.

• • •

CROSS EXAMINATION

BY MR. ALLEY:

• • •

[172] Q You didn't answer my question.

A If that's the philosophy, I differ with it, yes, sir.

Q Now, you say you left at the end of the first act?

A Second act.

Q Second act? You left at the end of the play, then, did you not?

A No, the play was still on. I went out when everyone went out to smoke a cigarette. I did, too. Instead of going back in the theatre, I went out.

Q How many acts were there?

A Been two years ago, sir, I don't remember. I believe it's a three-act play. I did not see the last act. If there's three acts, then I left at two. If it's a two-act play, I left at the end of one.

Q If it was a two-act play, you left at the end of the first?

A It's been two years ago, I don't recall.

Q Do you recall at what point in the play this attitude towards the flag was displayed?

A Had to be while I was there, of course, first or second act, I don't recall.

• • •

[186] Q So, as you sit here, you cannot say that the play had no redeeming social values, can you?

A The part or portion that I saw, had no redeeming social value.

Q You only saw a portion?

A I saw a portion. I was revolted and left.

Q The most revolting part for you, I believe, was the blasphemy, I believe, as you characterized —

A (Interposing) Blasphemy and sacrilegious attitude and gestures towards Almight God and Jesus Christ and His son and the desecration of the American flag and belittlement of the United States Government, that was enough for me.

Q These factors, you say, appeal to man's baser instincts but they did not appeal to yours?

A They appeal to the evil and baser instincts of anyone who would see it and they didn't — they didn't debase me. They didn't influence me.

Q Anyone that would —

A (Interposing) But it revolted —

Q (Interposing) Anyone who would advocate these things or perform these acts on the stage is advocating evil?

A Well, I saw no good that was coming from it, let's put it that way.

MR. ALLEY: All right, sir, thank you.

• • •

RECROSS EXAMINATION

BY MR. ALLEY:

• • •

[189] Q You don't recall?

A I beg your pardon?

Q You don't recall whether you purchased it or not?

A I don't.

Q If it is the practice of the theatre to sell these programs, not to give them away, then would you concede, then, that you had purchased same?

A As I told you, unfortunately, I am not a theatre goer. I could tell you about baseball and football but I don't know much about the theatre. I am — I just don't know.

Q You have been to three plays in New York. You have been to plays in the Little Theatre?

A Oh, last time I was there, I guess it was five or six years ago, maybe ten years before that.

THE COURT: What is the purpose of this?

THE WITNESS: I don't recall.

THE COURT: Cross examination of this —

MR. ALLEY: (Interposing) Well, your Honor, we produced for the defendants the program that would be here in Chattanooga. This program is from a play in New York that is not going to be sold here in Chattanooga. Now —

THE COURT: (Interposing) Those are matters you can show to the jury.

• • •

TESTIMONY OF JOHN ELLIS

DIRECT EXAMINATION

BY MR. NELSON:

• • •

[196] Q Can you tell us whether or not the play dealt with sexuality?

A Well, there's no question but what it did in all its forms.

Q Was there one scene, several scenes, many scenes?

A Many.

Q Can you tell us what types of sex acts took place in the play, Doctor?

A I don't know of any type of sex act that wasn't simulated with the exception that I didn't see anybody having sex with an animal.

Q Now, could you be a little bit specific and tell us specifically what did take place and describe the acts.

A Well, these were simulated acts, of course, you understand that. Generally males cannot perform actually on a stage, although sometimes they can, but the sex acts

were simulated between males and females and between females and females and between males and males and between mother and son and whatever else there is to do.

Q Now, you say "simulated." What do you mean by that word, Doctor?

[197] A I mean that the actors posed their bodies and went through motions that indicated sex acts, both natural or unnatural. Also that the music and the lights and the falling glitter from the stage simulated the climax that occurs.

Q Were there any scenes of masturbation in the play, Doctor?

A Yes, yes, yes. They would sing about that. One fellow stood up and said, "Masturbation can be fun," and gave a demonstration.

Q Could you tell us whether or not there were any nude scenes?

MR. ALLEY: Your Honor, I am going to object to this leading.

THE COURT: Well, he may answer the last question.

A The nude scenes? Yes. At least three that I recall. There was a lot of stuff that went on the stage. This wasn't a stage like you ordinarily see a play. As a matter of fact, there weren't any curtains drawn. It was a little bit like a circus in more ways than one; but what I mean by that is there was a center of action which was usually outlined by a spotlight. But there were many side actions going on.

• • •

[200] Q That answers it, Doctor.

MR. NELSON: You may ask him.

THE COURT: When you say, "I have never seen anything to compare with it," what do you mean?

THE WITNESS: Well, by that, you know, there are many forms of degradation. There was really no violence particularly in this play. There might be a bit but there wasn't much simulated violence to people or things. But with the exception of people having intercourse with animals, I can't think of any other type of carnal relationship that could be simulated that was not done in this play. There may be some that I have missed out on. And also it is beyond my imagination to imagine any fouler, more indecent, vile, offensive language than was used, not at one time but throughout the entire production. I would hesitate to do so, there are some women present in the courtroom, but I can give you some examples of that if you'd like.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. ALLEY:

Q What burlesque have you seen and where, Doctor?

A It has been some years but I was in New York and I don't remember the name. I was in Chicago one time and I have seen burlesque shows in both those and also in Tokyo, • • •

• • •

[208] And as I get it, the individual is sort of tempted to do so because he is dissatisfied with some things that happen. In the end, he fails to do that. He fails to go to the street and as I read the play, he meets his death as a result of not having heeded the advice given him.

Now, that's the social issue that presents to me, is ignore what your parents say, ignore what the school says, ignore the church and come live in the street with us.

Q And this is the only social issue of our time that this

play comments on, in your opinion?

A That's the overriding message to me.

Q That's not what I asked you, sir.

A It comments on — comments on nudity. You have mentioned that. It comments on drugs. Those are both important issues right now. It comments on profanity. It comments on the Vietnam War especially. It comments on politics because, LBJ was prominently mentioned. I understand it's been changed to Spiro T.

It comments in one way or another on most the social issues facing this country. But the overriding message is forget all that, come live in the street with me.

• • •

TESTIMONY OF COYEL RICKETTS

DIRECT EXAMINATION

BY MR. NELSON:

[220] A Well, before the play started, seems the cast was generally congregated throughout the stage area. Of course, the stage was a little dark at that time but you could see them just moving about and the orchestra, of course, was tuning up the various instruments and then some of the actors and actresses came out on the stage with huge boquets of flowers, long-stemmed flowers and began throwing these flowers into the audience. And one girl in particular, I think it was Sheila, came out with a bunch of these flowers and she was throwing them. On her costume right at her crotch she had a huge cherry and after they finished throwing the flowers into the audience, why, she moved back stage about center stage, I guess, and sat down and spread her legs real far apart.

Q I see. Was this clearly visible to you, sir?

A Beg your pardon?

Q Was this clearly visible to you?

A Yes.

Q Would you tell us then what happened in — during the first monologue in the play by, I believe, the character known as Berger, starting on Page 1-3 where he introduces himself?

A You want me to read the entire dialogue there?

Q I think it's already been read but —

[221] A "Hello, my name is George Berger, but I don't dig George. So just call me Banana Berger, or Cheese Burger, Unzipper Berge, Pull 'em down Berger, Karma Berger, Pitts Berger, Take 'em on Berger, Up your Berger," and he gave this sign when he —

Q (Interposing) Did he give it to the audience or who?

A To the audience.

Q I see. What did he do after that, sir?

A He took his pants off and he threw them into the crowd and they landed about first, second or third row. Someone caught them, I guess. Then he came off stage. He was wearing a pair of red, more or less, jockey shorts, I would call them, heavily beaded.

And he came off the stage. He played with these beads in such a manner as he was very, very — I don't know what he was trying to do, in case — gave an idea of masturbation, more or less.

And then he went into the crowd and he spotted a lady; sat on the back rows of the seat. The seats, of course, were just regular theatrical seats. He sat on the back of these seats with his legs spread out with the shorts on and he pointed to this lady and said, "Look at her, she is scared shitless."

That was the first thing that I heard him say [222] there and when he came out in the crowd.

Q Have you read the script, sir?

A Yes, sir.

Q Is this in this script?

A No, sir.

Q Now, let's progress on to Page 1-5 there where they are singing the song, "Sodomy, Fellatio, Cunnilingus, Pederasty, Father, why do these words sound so nasty, masturbation can be fun."

THE COURT: What page?

MR. NELSON: Page 1-5, your Honor.

Q Can you tell us what the cast was doing during the singing of these words?

A They were going through all these motions of sex intercourse, more or less. I'd call it dry sex or call it simulated sex; but, anyway, it was about three or four males, one female – female was in second, I think, and they were all back – I mean, going back to back in a fashion like they were having intercourse and after it was over the girl said, "I want to thank the last boy that came," or, "The last man that came on." That was the fifth man and that was Hud. I think, one of the chracters, Hud, that was the last man.

Q Now, during the time it says, "Masturbation can be fun, join the holy orgy, kama sutra everyone," who was [223] singing this, was it center stage or in the wings or –

A (Interposing) Beg your pardon?

Q The character who was singing, "Masturbation can be fun, join the holy orgy, kama sutra everyone," was he on center stage or was he to the side of the stage?

A He was on center stage.

Q And what was going on as to this character at that time?

A He had a red microphone – red colored microphone about this long and, of course, the microphone, where the voice goes into it is a bulb, you might call it, sticks out a little and he had it between his legs and he was lying flat on his back and he goes through a motion of masturbation there, real vivid, I mean, there's no question about it. And when he finishes, he moves his leg a little bit and the microphone hangs limp, just a perfect portrayal, almost.

Q Now, let's move along. Late in the first act towards the end where the nude scene comes in, Mr. Ricketts, could you describe this nude scene to us?

A Well, the nude scene came right at the close of the first act and it was a – it was singing. There was singing and the stage lights were down, not too dim, but they were down and this all – this all of a sudden, these – about two rows, I think, of nude, completely nude male and female – completely nude, visible in every sence (sic) of the word. [224] I guess it lasted, I don't know, just seems to be like maybe 30 seconds or something like that, the nude scene; but there is no question about it, it was visible in every sense of the word and it seemed to me like the males who were more malish than some males are were in the front row, and the best looking girls were also in the front row. This is just an observation that I got.

Q How long did this nude scene last, did you say?

A I'd say, seemed to me like 30 seconds, that's an estimate on my part.

Q And were the private parts of these individuals –

A (Interposing) Definitely.

Q – visible?

A Yes, sir, definitely.

Q Okay. Now, then, let's go on to the second act. I refer to Page 2-6 where the tribe picks up the picture

of the – let's see, I am not sure that's the page or not. But, the –

A (Interposing) Mick Jagger.

Q Yes. That's six, 2-6, where the tribe picks up the picture of Mick Jagger and it's eventually placed on the stage and one of the characters comes over and –

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[229] THE COURT: All right. Were there other matters not in the script that you heard?

THE WITNESS: Oh, I think this was in the script, anyone who says anything is bad about marijuana is full of shit, I think that's in the script.

MR. NELSON: Excuse me, one other place – this is relevant – is the nude scene in the script, does the script tell the players to go nude on stage?

THE WITNESS: No, no, no indication whatever there will be a nude scene. All of a sudden, bingo, it appears; no indication.

THE COURT: All right. Now, do you wish to have Mr. Thrasher return before you take up any cross examination?

MR. ALLEY: Makes no difference to me, your Honor. I was just – thought maybe it might be an accommodation to Mr. Thrasher.

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TESTIMONY OF COYEL RICKETTS

CROSS EXAMINATION

BY MR. ALLEY:

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[240] Q Yes, sir. Did you see anything in this play about the Vietnam War?

A Oh, yes, yes.

Q Well, would you tell us what you saw about it?

A I saw the scene where the – where he pisses on draft card and threatens to burn it and heard the, "Hell, no, I won't go," thing; and I heard the – all the dissent there at the last where Claude, I think, is brought in lying on the sheet. I saw all that. I saw the entire performance.

Q All right, sir. What, basically what did you derive from these comments on the Vietnam War?

A That they were against the Vietnam War.

Q All right, sir. Is this contrary to your philosophy?

A The Vietnam War situation has changed quite a bit since this play was played. And I think that – that at this time I had a son in the Army. I was very upset about it. I would take this directly against my philosophy, yes, I could say that.

Q But you do admit –

A (Interposing) Yes, I could say I don't agree with this at all.

Q But you do admit that the overall tenure of the [241] country since this play –

A (Interposing) At this time.

Q – was produced has changed?

A Yes.

Q Considering the Vietnam War?

A Yes.

Q Do you think this play might have had anything to do with that?

A Well, that, I can't answer you; wouldn't be fair. I don't know whether it had anything –

Q (Interposing) You don't know whether it did or not?

A It could have.

Q All right, sir. What did you say?

A It could be a contributing factor.

Q All right, sir. What did you see in this play concerning draft?

A Draft?

Q Yes, what was the general import to you of the comments of the draft?

A Trying every way in the world to evade it, anything necessary to evade it.

Q All right, sir. They disagreed with the draft?

A Absolutely.

Q Now, has the law regarding draft changed to your [242] knowledge since this play first opened?

A Yes, I think it's been lowered because of the pulling out of troops in Vietnam. Naturally you don't need the – I think the draft quota has been lowered. I think the women have become status with the draft or will be.

Q Have not the entire system of choosing who is drafted and who is not been changed, sir?

A I am not too sure, used to be built mostly on scholastic exceptions and things like this. This could have changed. I haven't kept abreast of the recent draft law since my son has been in the Army and out.

Q You are not aware, now, they have birthday, whatever your birthday and draw –

A (Interposing) I am sure I have read that, yes, and drawed out of a huge – you have a new draft commissioner, too. I think Hershey retired and another one set his own patterns. I guess everything changes when –

Q (Interposing) Or Congress changes the law?

A Congress changes the law, definitely.

Q Do you think perhaps this play had anything to do with that?

A Well, everything together, this play could be – could

have been a contributing factor, I mean, I don't know. I can't answer that yes or no.

Q Do you think dissent is valid in this country?

[243] A Did I think what?

Q Dissent is valid in this country?

A Sex?

Q Dissent.

A Dissent? Oh, sure, dissent is valid. I mean, you can dissent any time you want. That's freedom.

Q Except on the stage in the civic Auditorium here?

A Except when you dissent with nude scenes and the way they – what goes along with what they did in their dissention, the way they conducted –

Q (Interposing) They can dissent in your opinion but not if there is a nude scene?

A How can they dissent by masturbation? What are they dissenting about or simulating dry sex? What are they dissenting?

Q So you're only objecting then to certain portions of the play?

A No, I am not.

Q I am trying to understand.

A I am not objecting to any certain portions. I object to the whole play.

Q You are not objecting to any portions of the play?

A I said any certain portions.

Q Oh, all right, sir. You are objecting to the [244] whole play?

A To what I saw.

Q The play in Charleston, South Carolina, the play "Hair", and you are objecting to the total play?

A I just said what I saw and that's all.

Q You did say you saw the Vietnam War protest?

A Uh-huh.

Q You did say you saw the draft protest, you are objecting to that, then?

A Go back to the time that scene was done and I would have been objecting to that, yes.

Q And you are objecting to the people in Chattanooga seeing that?

A None of my business what the people of Chattanooga see. I am just telling you – what they saw, I can't decide. What they see and don't see, I am not a censor.

Q We went through this before.

A Beg your pardon?

Q We went through this once before, you kept saying, "I don't object to what the people of Chattanooga see." You can object to what they see in Memorial Auditorium, can you not?

A Yes, and I wouldn't bring it to the Memorial Auditorium, neither would I vote to bring to the Tivoli Theatre. If you are asking that question, I will answer it [245] directly. All right, I answered you.

Q That's what I am asking, as far as using Memorial Auditorium, you do not want the people of Chattanooga to see this play?

A I don't want it played in Memorial Auditorium or the Tivoli Theatre. I would not advocate it, if I had a chance to, I'd vote against it again.

Q You are against even the portions of it concerning the Vietnam War?

A I am against the play being shown because of what I saw in the play.

Q Well, this is what I am trying – I am not sure I understand your testimony.

A I am not sure – I am trying to understand your question, either.

Q You said you don't object to dissent but, "I object to dissent where there is a nude scene involved." Now, I am saying, are you objecting to the nude scene alone and then without it –

A (Interposing) Oh, no, no.

Q – dissent would be valid?

A I am not objecting to the nude scene alone. I am objecting to the idea on drugs, for instance.

Q I am talking about as far as that one idea.

A One idea, I object to the nude scene, yes.

[246] Q Well, what about the Vietnam War portions?

A If it was back when this play was probably written, the script was written, I would have objected to that attitude, yes. But now –

Q (Interposing) This April, 1972.

A Well, the Vietnam War has changed. I wouldn't strongly object to that.

Q You would a little bit?

A No, I wouldn't go either way on it.

Q What about the draft?

A Well, the draft, same way. Of course, the draft laws have been changed. That's been taken care of.

Q You were – so you wouldn't object?

A Oh, no, not to any great extent.

Q To any great extent, this is what I don't understand. Would you or would you not object to this?

A No, not – not too strongly. I might have a mild objection.

Q You might have a mild objection? Do you or do you not have a mild objection?

A To the draft?

Q To the draft as portrayed in this play.

A Oh, yes, I object to the way it's portrayed in the play, yes, yes.

Q All right, sir. What about the ecology comments [247] in the play, what did you derive from them?

A Well, there is a lot of facts in the ecology scene, pure air and things like that. The ecology, you know, is in so much in demand now, so much discussed over, it's bound to be popular. I think they were ahead of their times a little bit in that scene.

Q You think they were ahead of their times in that scene? Do you think that scene might, or this portion of that play might have had some impact on the thinking of this country towards ecology?

A Could have done.

Q Could have done? All right, sir. And you do say that the total idea of this country is now more in line with what the play portrays?

A No, no, no, not – about what?

Q The ecology.

A Ecology? Yes, yes.

Q Ecology. Issue on the Vietnam War?

A Discussing ecology issue, yes.

Q And the same would be true of the Vietnam War issue?

A Yes.

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[252] Q Does that mean the second act?

A Yes, has to be the second act.

Q All right, sir. The play you saw, that's where this song occurred, in the second act?

A 2-8. I presume it's the second act. Yeah, has to be because it's so close.

Q So the song by the three black girls and the song by the three white girls occurred in the second act, this is the point?

A Let me verify it, will you, please?

Q Yes, sir. Think you found one, you will find the other one right next to it.

A Yes, Act 2 because Act 2 is way back here, starts on 2-1 is Act 2, so this is – this would be Act 2.

Q Definitely Act 2?

A Yes.

Q All right, sir. Now, what did you derive from that?

A Well, I derived that colored girls like white boys and white boys like colored girls sexually.

Q Well, this comment on racism, did this offend you?

A I can't define that as racism. I don't know. I can't definitely define –

[253] Q (Interposing) Do you think it's a valid comment?

A Beg your pardon?

Q Do you think this is a valid comment?

A Well, it could well be. I can't dispute it. I see where people on the University of Chattanooga campus yesterday, told the colored boys that every time in their life they'd had desire for a white woman so I guess it's pretty prevalent among –

Q (Interposing) Let's – excuse me, did you see any satire in this script?

A Beg your pardon?

Q Did you note any satire in the script?

A No, what do you mean by satire?

Q Making fun of? Did you see it in the play, sir?

A Not that I recall. I don't know if they are making fun.

Q So this could not have been a satirical comedy?

A It could have been, I mean, in some respects it could have been.

Q All right. Did you enjoy any portions of it, sir?

A Did I do what?

Q Enjoy any portions of the play?

A Well, from the opening number, Aquarius, the music, I guess, and probably Let The Sunshine In was but [254] even during that, the bodies were entwined in the Aquarius number, one to the other; so it was after that, in between that it was complete.

Q Bodies entwined, male and female?

A Uh-huh, male and male.

Q Male and male?

A I guess they were simulating love, Aquarius being the age of love.

Q Bodies were entwined, they were very close together?

A Embracing, yes.

Q Embracing, sir? Have you ever been to a dance?

A Been a long time, sir, about past that stage.

Q You haven't been to any recently, then?

A No.

Q All right, sir. Would it surprise you to know that sometimes male and female bodies are entwined dancing in Chattanooga, Tennessee?

A Not like these were entwined, I believe.

Q You say so but you haven't seen any in a long time?

A Haven't seen anything like this in a long time, either.

Q All right, sir. You are not saying, then, that this is not occurring in Chattanooga?

[255] A I can't say, I haven't been there.

Q Of course, sir, you are not claiming expertise in the theatre, are you?

A Beg your pardon?

Q You are not claiming any expertise in the theatre, are you?

A No.

Q You are just an average citizen in Chattanooga?

A I call myself average.

Q All right. Now, you said you hadn't seen anything like this at all on the live stage?

A Huh-uh.

Q Where have you seen things like this?

A Movies.

Q Bey your pardon?

A In movies.

Q In movies? Which movies have you seen?

A Well, I was in the United States Marshal's office 16½ years. We confiscated many films and I have seen them there. That's–

Q (Interposing) Was it part of your duty as United States Marshal to view these films you confiscated?

A Worked with the Postal Department and United States Attorney's office, I could view the films, yes.

Q You say you could view them, I say was it part [256] of your duties to view them?

A Well, not necessarily but I saw them. They were – let's put it this way, the films were placed in my custody if they were used as evidence when I was a marshal.

Q Who's Mick Jagger?

A Mick Jagger? I guess he's a rock singer.

Q You guess?

A Yes, really, I think he is, I think. I have never heard, I don't think I have ever heard a recording by him but I believe–

Q (Interposing) Had you ever heard his name before the play?

A Yes.

Q To your knowledge?

A Yes, I think I have, yes, I have heard his name.

Q When they said in the play, "Mick Jagger," you knew immediately who they were talking about?

A Didn't dawn on me, no, didn't connect him with rock singing. I didn't know him that well. I don't know him that well. I just believe he is a rock singer.

Q You knew some famous figure, though?

A Yeah.

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[264] Q Well–

A (Interposing) I'd say less than 50 percent.

Q Less than 50 percent? Would you say less than 20 percent?

A I'd say over 20 percent probably.

Q In your opinion, then, over 20 percent of the time spent on the stage on this play, simulated acts were–this was the time it was involved in playing simulated–showing simulated sex acts other than when the music was playing?

A Well, it was continuous, practically.

Q Continuous?

A Practically. Some of the things that hadn't been brought out here was the fact that even during when there was no simulation of sex, they'd have their feet up between each other's legs on the floor, tickling with their toes and things. If you try to arrive at the time it takes to go through all this, it's almost impossible.

Q You heard Commissioner Conrad testify yesterday, did you not?

A Yes.

TESTIMONY OF ALBERT L. GRESHAM

DIRECT EXAMINATION

BY MR. ALLEY:

[280] Q Would you state your name, please, sir?

A Albert Gresham.

Q Mr. Gresham, what is your address?

A 315½ Chambliss Street.

Q Here in Chattanooga?

A Yes.

Q What is your occupation, sir?

A I am the director of the Chattanooga Little Theare.

Q Chattanooga Little Theatre here?

A Yes.

Q What is your background in the theatre, sir?

A I have been a professional director since 1950. The last seven years have been as director of the Little Theatre here in Chattanooga. Previous to that, I was director with Educational Television in Memphis, WKNO, for seven years, and producer-director for Commercial Television for five years.

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[282] Q All right, sir. Would you be so kind as to give the Court and the jury your comments concerning what you derived from examining this libretto?

MR. COLLINS: Now, if your Honor please, I would like to interpose an objection at this time to this witness attempting to testify upon the issue before this jury as it relates to the offer to produce "Hair" in Chattanooga for the reason that I am informed that this witness has never seen "Hair" produced. The proof is undisputed in this record that the actual production of "Hair" deviates sub-

stantially from the written script, that the conduct and the action that takes place upon the stage, very little is depicted or referred to in this script; so, if he seeks to comment or analyze strictly upon this script, he is taking only a portion of the total product and it's the total product that this jury will be asked to pass upon.

THE COURT: These are matters you can develop upon examination or cross examination of the witness.

Q You may answer.

A May I use notes?

Q Yes, sir, you may.

A Studying the libretto, the script, I find that the theme of the play—what I did with it was study it and analyze it just as I would if I were directing the play, take the play apart, see how it is put together, what is [283] going on in the play; and why is it put together in this way? What are the elements, theatrical elements in the play that can be utilized in a production and putting it on stage? What is the theme of the play? What is it about and how would you develop this theme on stage, you know, as you transfer it back to the stage.

So I found that the theme of the play is the need for rebirth or change in the Christian sense, he must be born again in order to enter the kingdom of heaven, in other words, there must be a change, rebirth, not only in individuals but through the individuals, a change in the culture or the society before certain desirable things take place in that society.

In this sense, the play is a revolutionary play and uses, underlining this fact, posters, banners, a rally in the play, charts, things of that sort. This theme is stated at the every beginning of the play in the first song, "Aquarius." The words say, "Harmony and understanding, sympathy and trust abounding, no more falsehoods or derisions,"

a change, "Golden living dreams of visions, mystic crystal revelation, and the minds true liberation," this is what they want in the play. "Peace will guide the planets and love will steer the stars." So there needs to be a movement, a change, a rebirth to these things.

The play is strange in structure in that it is [284] not the standard, traditional play form, which is in keeping with the theme of the play. They want a change from the traditional, from the norm and so they do not write the traditional play. The traditional form of a play is the exposure—you meet who the people are in the play. Then the next step, traditionally, is a rising action or a conflict—one person in the play wants something, somebody else in the play wants something else. There is a conflict and this builds the action of the play.

The next step is the climax of the play, one side or the other wins; and then falling action, everything is resolved.

Now, these playwrights in this play did not use this traditional form. They go back to the beginnings of theatre and borrow from primitive rituals, the very beginning of theatre, a ritual form, a right, a sacrificial right, it's a ceremony, not just a story but a ceremony performed on the stage. It's a ceremony in the form of the ritual sacrifice and it's the destruction of something of value for appeasement of the Gods so that something of value will result so that the people may live in peace and prosper. It's the sacrifice of the lamb, sacrifice of the virgins, sacrifice of something good so that something good will result. What I am talking about is, this Claude is the chosen one, the sacrificial lamb. He is drafted and [285] destroyed in the course of the play. In the play, he is identified early in the play with reigious matters, sacrifices. He says, identifying himself, "I am a genius, genius. I believe in God and I believe that God believes in Claude,

that's me." He says, "I am Aquarius, destined for greatness or madness." He says, "I got life Mother, I got laughs, Sister, I got freedom, Brother, I got good times, Man, and I am going to spread it around the world, Brother, I am going to spread it around the world, Sister."

In the religious feeling of the brother, sister, "I am going to spread it around the world, Brother, so everybody knows what I got." He says in the play, "I am the son of God, don't mess with me." He says, "Bless you, bless you, bless you, I believe in Jesus," and he throws flowers to the tribe.

He is a—the chosen one. He is identified through the words and the play with martyrs. His identification as the chosen one is strengthened in the title song, "They'll be ga ga at the go go, when they see me in my togo."

MR. COLLINS: Your Honor please, I'd like to interpose an objection to him reading his testimony.

MR. ALLY: Merely referring to his notes.

A I haven't memorized the lines from the play, I am sorry.

Q Would you like to refer to—

[286] THE COURT: (Interposing) He may state his answer.

Q —any portion you want to, you may refer to the actual page.

A Oh, fine. Well, I have just copied from that to this to refer to so I know what's—

Q (Interposing) You may answer.

A So, anyway, the chosen one. Another point that identifies him as this early in the play, in the title song "Hair" and "They'll be ga ga at the go go, when they see me in my togo, my togo made of blond brilliantined biblical hair, my hair like Jesus wore it," in the identification of the martyr, "Hallelujah, I adore it. Mallelujah Mary loved

her son, why don't my mother love me? Hair, Hair, Flow it, show it, long as God can grow it, my hair." The identification with the deity.

He is described by characters in the play as Claude, the purest mind on Avenue C; described as the most beautiful beast in the forest. Again the sacrificial virgin, something of value that must be sacrificed to the gods for them to respond and give the people peace, prosperity and so forth.

Now, it's not a—so the tension of the play comes because it is not a willing sacrifice. He doesn't know—he doesn't want to be sacrified. He says, "They are [287] not going to get me. That's it. They are not going to get me," he says early in the play. Then by the end of the first act, he is examining himself, his life, wondering who he is, what is the purpose of his life? Is there a purpose in his life? The song that ends the first act is "Where do I go? Follow the children. Where do I go? Follow their smiles. Is there an answer in their sweet faces that tells me why I live and die? Follow the wind song. Follow the thunder. Follow the neon in young lovers eyes. Where do I go? Follow my heartbeat. Where do I go? Follow my hand. Where will they lead me? And will I ever discover why I live and die?"

And that takes us to the intermission of the play and you see the movement. He is being set up for the sacrifice. Now, in order for the sacrifice to have any meaning, the audience must identify with the people on the stage. They have got to be a part of the ritual in this structure. They are a part of the play if the sacrifice is to mean anything to them.

So in the structure of the play there are all the atempts to involve the audience. They talk to the audience. They give things to the audiences, things of that sort, to involve

them in this ceremony that is going on, the ceremony is the sacrifice.

Now, for it to have meaning, there must be [288] problems which make the sacrifice necessary. Why is he to die, you know, what is wrong? That he must die to be set right? Some of the problems stated in the play are lack of love, harmony and understanding, sympathy and trust, freedom. They deal with pollution, hypocrisy, racism, the alienation of the generations, loneliness, war and the instruments of war, killing the internalization, the dehumanization of man, the exportation of people, resources; false social and moral values, that is, people who say one thing and practice something else, preach one thing and do something else. These things that they say are wrong need to be corrected and they offer a sacrifice to correct this.

Another one is violence in the streets, a rape in the streets of the play, something's wrong that needs to be corrected so they are offering the sacrifice.

Now, before the play started, the tribe, you see, the ritual, call it a tribe, has made some attempts to deal with the problem. They banded together. They refused to live and recognize these standards of behavior of values which they don't approve of. They try to escape through the use of drugs. They ridicule and mock the things that they don't like to downgrade it. They treat as nonsense what they consider nonsense.

Now, these points here are a couple of flaws in the play in that so much time is spent on the specific [289] social problems like pollution or racism, that it gets in the way, really, of the forward movement of the play. And the ridicule tends to obscure the—some of the points in the play. When they make light of something, it's easy to assume that they don't feel deeply about it but sometimes we do that, make light of something for which we feel

very deeply. So as the play progresses, following this line as the movement of sacrifice nears, the tribe deplore the need for the sacrifice but at the same time they recognize the reasons for it. They say, "How dare they try to end this beauty?" They say, you see, they say, "In this dive, we rediscovered sensation." Again, rebirth, a change to something better; "Walking in space we find the purpose of peace. The beauty of life you can no longer hide. Your eyes are open wide," and the momentum of the play builds as we get closer to the sacrifice; "The falsehoods and derisions," as they are called in the play, the things they don't like are presented all over again in a nightmare form, in a trip and which ends with a mock death of Claude as part of the nightmare and the statement of the play. The thing is stated three times; very beginning of the play, you know, in the ritual of cutting a piece of Claude's hair and burning it, you see, making the sacrifice. Here's the man who's going to be sacrificed; in the nightmare, the bad trip in the play, he is destroyed, he is killed. And at the end of the nightmare, [290] he is identified with his—the meaning of his death is suggested and the larger meaning of his death and his death is associated with the death of youth sacrificed in war, the sacrifice of youth in war, the death of something of value so that something of value to society will result, you see.

In the song, "Ripped open by metal explosions," climax of the nightmare, it's war, "Caught in barbed wire, fireball bullet shock, bayonet electricity, shrapnelled throbbing meat, electronic data."

We are—he is being sacrified as youth is sacrified in war.

Then, in the climax of the play and midst this scene of destruction, it is immediately followed by its opposite—what is man capable of? What is man, the poet's view of man in contrast to this death and destruction, metal ex-

plosion, the barbed wire and so forth? They say, "What a piece of work is man," immediately following–sharp contrast to the death and destruction. They say, "What a piece of work is man? How noble in reason, how infinite in faculties. In form, in moving, how express and admirable. In action, how like an angel. In apprehension how like a God.

You see the ironic contrast, which is theatrical structure and this is really the high point of the play.

[291] Contrast between that man can be and what he is as demonstrated by the nightmare, leaves the tribe dejected, low and frustrated and they are at the low point, a down point, now, you see, there is need for the sacrifice. You have this war, destruction, death; but man can be a piece of work, noble in reason and so forth. And at this point in the play, Claude begins to accept his role as the sacrifice, sacrificial lamb. He says at this point, "Oh, my God, I feel lonely. I want to sleep in mushrooms and eat the sun because I know where it's at. I know what I want to be, invisible. I could float around and slip into people's minds and know exactly what they are doing and thinking. I could go anywhere, do anything. I could perform miracles." Again he says, "That's the only thing I want to do or be on this dirt."

At this point, the tribe touch him. He is their sacrifice. He says, in recognition of his new role, "I wish the fuck it would snow at least." Kind of shocking thing to say but at this point he doesn't want to die but he feels it's necessary. He's being pushed into something he doesn't want to do but he has to do. The word adds tension and strength to the line. It's recognizable to the aduience as contemporary. It's what they would say or could say in a similar circumstance. It doesn't have anything to do with sex, by the way. It means a basic elemental force in the

[292] life of man. He could say, "I wish to God it would snow," but he can't say that because he is the emissary to God. He is the martyr, you see. He is the representative. He can't use the Lord's name in vain but he has–but in order to give strength to the line, he has to use something which is basic, strong and to the point that people can recognize as this expressing his frustrations and says, "I wish to fuck it would snow." He says, "I wish it was the biggest fucking snowstorm," again elemental force. "Blizzards come down in sheets. Come on mountains, rivers, oceans, forests, rabbits, cover everything in beautiful white holy snow." Again, the identification with the martyr. "I could hide out a hermit and hang on a cross and eat cornflakes." The identification with the martyr, the identification with people–eat cornflakes. He used both, you see.

Then, at this point in the play, it begins to climb. The structure which is symbolic of his ascension is, and as he climbs, the members of the tribe call him down. He asks them, "Are we going some place together," and they answer, "Yeah."

He says, "Tonight is the last night of the world, we stick together." And he disappears, it's time for the sacrifice. Although he is invisible, he still has an effect on the tribe. He is gone. They can't see him. He sings a song and they repeat the song, although at the same time [293] they are saying, "Where is he? Where is Claude? He should be here so that he will know he is not there." He still has an effect on them, you see.

He says to them, "I am here, like it or not, they got me." You see, taking place. He says, "Somewhere inside something there is a rush of greatness, who knows what stands in front of our lives, what future," he says, "I feel like I died." He is invisible. "Vitamin C, I can perform miracles. That's the only thing I want to do on this dirt if I

am unseen. I believe in God, I believe that God believes in Cluade, that's me." Sacrifice is taking place.

And then the tribe sings the final song calling for the results of the sacrifice now he's dead. Let the Sunshine in. Let the—this goodness, this understanding and love take place and we have our sacrifice. That's basically what is in the book or the movement of it and the line of action, this is the story in the play.

Now, this sacrifice has a background in theatre. As I say, it's based on primitive religious rituals. The Greek tragedy is much the same way. Oedipus Rex dies, you know, dies for the people. He must be destroyed before some good results for society. He must be the one to die. He is the chosen one.

Now, Christ, of course, is the most—story that comes most immediately to mind of this kind of sacrifice. [294] Other people in the theatre review similar things. Ibsen in "Enemy of the People," a main is destroyed trying to better society. And at the end is struggling to improve society. So it's not an unusual theme in a play. But the going directly to the ritual instead of doing it as a more traditional story is unusual.

Now, if the ritual is to be effected theatrically, there is some things that must be on the stage. The tribe, the people, the cast, the people on the stage performing the ritual along with the audience must be outcasts. They must need something. They must be in rebellion against the status quo and they must be recognized by the audience as contemporary with the audience and real to the audience; otherwise, it becomes an abstract thing, you know, it doesn't mean anything to you as you watch the play unless you can identify with the people on the stage. You got to recognize them, say, "Yes, that's a real person," you know, "I know what that person is like," in order the ritual to

have any meaning for the audience. There must be something of value needed in return for the sacrifice.

Stated quite often in the play what they want is love, peace, the mind is true, liberation – they say in the second song in the play—stated life on earth can be sweet. It can be but something has to be done to make it that way.

Now, the play is very poetic in form and poetry [295] doesn't go over too well in the theatre, as a rule. Playwrights have conquered this to a great extent by balancing the poetic words, words that we don't hear too often with words that are extremely real, that we hear every day and usually have an unpleasant connotation to balance the poetic feeling. For instance, "The spade, nigger, jungle bunny, underwear, garbage, puss, piss, germs" words used in the play but they balance and they are necessary so the audience will listen to it and hear the words such as, "Astro, catoclism, ectoplasm, sonic armor, medusan cord, void." And another trick the playwrights use to make it real to the audience is that they use names of people that you know, "Dinah Shore, James Brown, Tonto, Rockefeller, Humphrey, Wallace," and by making these real people a part of the play, part of the references of the play, then the audience is more ready to accept the myth people or the abstract people.

The historical people, Lucifer, Lincoln, Washington, John Smith, Pocahontas—these names which give the play the historical reference, you see.

Some of the other theatrical devices used by the playwrights to capture and hold the attention of the audience while they make their statements is recognition. You have to recognize that it's happening, it's true—humor, [296] use a great deal of humor; the direct involvement of the audience, trying to get the audience to participate. You are the part of the ritual, they keep suggesting by doing—

handing the audience things, involving the audience, talking directly to the audience, that kind of thing.

The music, of course, is used, the contrast of volume, the relevance to the lives, the impertinance, surprise, repetition are all theatrical devices which the play uses, and they are used in this to make the audience accept what's being said.

As I say, there are flaws in the play. One is the character of Berger, who tends to be overwritten, I feel, and overshadowed Claude to some extent which sort of hides the main line of the play. In the production, Berger, if I were doing the play, I'd down Berger, is what I am saying, because he tends to hide Claude and the main line of the play.

As I say, another big flaw with the play is the emphasis on special social problems so that the general – "Something is rotten in the State of Denmark" – the general social thing for which – which the movement of the play calls for, "He is dying for the good of the people," gets lost and he is dying for racism, he is dying for pollution, he is dying for this, that those things get such an emphasis that he is dying for understanding and love and so forth, it kind [297] of gets kind of lost, that would be my analysis of the play.

Q All right, sir. Mr. Gresham, as an expert in the theatre, is this play very significant in the theatre, just in what context?

A Significant in the theatre?

Q Yes, is it a significant play?

A Yes, I think it's – it would be compared with "Oklahoma." "Oklahoma" in the – before "Oklahoma," there was no strong story line, really in musicals. It was mostly music and there was no real effort in making the story believable, the little nonsense that went on. But the music

was the main thing and the dance and the pretty girls. "Oklahoma" came along with the strong story line. Well, then, the theatre, the time "Hair" came along had reached the point where the audience for the theatre was a certain class of people. It was the professional man, the businessman, the middle class, the upper middle class, the upper strata of society. When people went to the theatre – "Hair" came and appealed to the scoiety as a whole. The music was no longer sweet, pretty, Rogers and Hammerstein, but it was the music of movement, of life, of the young people, people who are not necessarily theatre audience. It opened up wider audiences to the theatre. It brought a new kind of music to the theatre and a new seriousness even beyond that of "Oklahoma."

So historically, I think it is a very valuable work in the theatre.

[298] Q All right, sir. Would you say that the play had social significance?

A I think that that's what the play is about. I mean, as – what I have just said would be an answer to that, I think. It is about social problems.

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TESTIMONY OF DONALD KLINEFELTER

DIRECT EXAMINATION

BY MR. ALLEY:

[310] Q State your name, please, sir.

A Donald Klinefelter (spelling) D-o-n-a-l-d- K-l-i-n-e-f-e-l-t-e-r.

Q What is your address, Mr. Klinefelter?

A 3400 Gayle Drive, Chattanooga, 37412.

Q What is your occupation or profession?

A I teach at the University.

Q What subjects do you teach, sir?

A I teach Philosophy and Religion.

Q What is your educational background, sir?

A I have a BA from Carleton College and BDMA Ph.D from the University of Chicago.

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CROSS EXAMINATION

BY MR NELSON:

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[313] Q Do you remember Berger introducing himself to the audience, saying my name is, "George Berger, Unzipper Berger, Pull 'em down Berger, Up your Berger," and making an obscene gesture to the audience?

A I – would you rephrase the last part of the question, please?

Q Do you remember him saying, "Up your Berger," and then making an obscene gesture to the audience, raising his finger?

MR. ALLEY: I object to counsel characterizing the gesture as obscene. This is what we are here, to try whether in this context, something is or is not obscene.

MR. NELSON: Very well. I will withdraw that.

Q Do you remember him raising his middle finger at the audience and leaving the rest of his fingers down?

A I think I do, yes.

Q Do you see any redeeming social value in such acts as this?

MR. ALLEY: Your Honor, I object. He is asking – you can't dissect this play portion by portion and say there [314] is – does this portion have any redeeming social value, that's not the issue, either.

MR. NELSON: I think one of the issues –

THE COURT: Overrule the objection.

Q Okay.

A Would you repeat the question, please

Q Do you recall Mr. Berger – you lost me – do you know of any redeeming social value in such gestures as this to the audience, have for the audience?

A I think in some context it can have redeeming social value.

Q How about this context where he's coming out, his first presentation to the audience on the stage?

A Yes, it awakened my sensibilities that I was in for an extraordinary experience.

Q I think that that is very right. I think you said it better than any of us could and isn't it true, then, that he further awakened your sensibilities by taking off his pants and throwing them down into the audience to some lady in the first rov

A I do not recall that episode at all in the Boston performance I saw.

Q It wasn't in it?

A I do not recall it being in that performance.

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[315] Q You say the play is adapted for each performance. What do you mean by that, sir?

A I mean that the jokes were tailored to the Boston audience rather than the San Francisco audience.

But there is a basic script that goes throughout all of these, is there not?

A Yes, I think so, but –

Q (Interposing) You have only seen it once?

A Yes, that's correct.

Q That was last July 30?

A That's correct, two years ago.

Q Do you recall seeing sex acts actually performed on stage, the only being missing that they had their clothes on

A Yes.

MR. ALLEY: Object.

Q How many times in that particular performance that you saw, sir?

[316] A I don't recall how many times.

Q Would you say there was one or few or several or many?

A I would say several.

Q I see. How long was the nude scene in the Boston play

A I would say four minutes, three or four minutes. It was – the reason I have difficulty specifying it is that there were lots of strobe lights flashing and there was a lot of music accompanying it and my mind was not on the time factor at all. So I may be inaccurate.

Q Do you recall how many players were on the stage at that time, approximately?

A I would say ten at least.

Q Were they both male and female

A Yes.

Q Is it not true that all of their private parts were fully exposed to the audience and in plain sight of the audience?

A Well, I couldn't distinguish their private from their public parts; but the lights were – I mean the lighting was such and the – I, quite candidly, I had a front row – front row balcony seat or two or three seats up in the balcony. I could not see at all clearly.

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[318] Q So, if this was in there, you don't remember?

A I just do not remember. It may have been in it, I just don't recall, I am sorry.

Q Would you have approved of this type of thing?

A I, personally, if that's relevant, would have approved, in context of the play, yes.

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TESTIMONY OF ROBERT CHERIN

DIRECT EXAMINATION

BY MR. ALLEY:

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[321] • • • It is an event or happening or a set of circumstances in which a group of young people, that segment of the population which "Hair" depicts, attend this setting and the actual reason that it came about that was during these be-ins, numerous members of those in attendance did, in fact, undress so that it is, first of all, documentary; second of all, it does signify that the end of the first act, the hoped for cleansing and rebirth of this society which is what "Hair" hopes for, that is the ideology and philosophy that "Hair" is hoping to depict to its audience, whether or not it – its audience accepts or denies that ideology or philosophy is entirely up to that audience – what is hoped for is that it will give them an opportunity to think about the major issues that have confronted this country at this time, taking into consideration that "Hair" was done – was written in actuality in 1966, was presented the first time in 1967 and was presented on Broadway in 1968.

Those issues which "Hair" deals with were major issues confronting this country then or have become major issues confronting this country. At the time that "Hair" was

presented, the Vietnam War was not a major political issue. I am talking about in 1967, 1966, when it was written. And the antiwar feelings in this country were of a very small minority. I will not claim to know the majority now accepts the antiwar premise. However, let us say that the minority [322] has grown to great magnitude.

The race issue, although it has confronted this country for many years, is depicted in "Hair" almost as a spoof in that what "Hair" is attempting to depict is that 100 years age the slaves were given their freedom and therefore implied equality. In 1964, the Civil Rights Act was passed and yet there are still sections in this country where, although they are not slaves, blacks are certainly not equal.

The air pollution problem, which was in 1966, '67 and '68 had a very minor issue in this country and has now become a major issue. The attitude toward the smoking of marijuana has altered radically since the time that "Hair" was written.

The attitude on sex, which seems to be of major contention in this courtroom, I believe, depicts a segment of the population who believe that love is more important than sex and that the hypocrisy that has been involved in our attitude toward the sexual mores of this country perhaps is wrong. Whether or not "Hair" preaches free love, I believe, is argumentative. If they point out the possibilities, if they point out the possibilities of a hypocritic attitude toward sex in this country and by virtue of that, in five years, as in other areas that they have pointed out, five years later are now slowly turning to, not necessarily Hair's way of thinking, but they have come along. If they [323] point out the hypocrisy in our attitudes toward sex, the fact that although we may not condone sex, do we or do we not condone adultery – and I am talking about on a nationwide basis, not necessarily about Chattanooga,

Tennessee – if in five years "Hair" can point those out to at least a point where maybe the young population feel that there will be changes or that the young population will grow out of this rebellious state which they are in and then turn around and say, "Yes, these things are good," at least they have pointed them out for discussion.

Q Now, back to the nude scene, what is the setting of that scene?

A Well, I would beg the Court's indulgence while I at least give some technical figures. The average lighting on the stage during the balance of the show is 36,800 watts or kilowatts of light on the stage during the balance of the show. The lighting in the nude scene, there are some segments – one is prior to – the cast goes under a canvas and I might, at this time, interject one thing, and that is that mention has been made of the fact that the nude scene is not in the script. The reason, gentlemen, the nude scene is not is that no member of the cast of "Hair" or of any cast of any American production of "Hair" has ever been required by contract to do the nude scene. That scene is done based on a voluntary basis. I have been in the audince [324] when as few as, I believe, six was the smallest number and as many, I think, as 14 – that is the most that I have personally seen.

To get off of that and back on to the lighting, excuse me, at the start of the actual – after the cast has come out and they are standing still and do remain standing still during that entire 30-second period, which is exactly give, or take, five seconds, how long the nude scene lasts, the entire company stands still.

Now, by comparison to that 36,800 watts of lighting during the balance of the show, there are, at the start of that scene 5,000 watts of light. The only way I can equate that, that is we do know that without infrared film,

it has been impossible to photograph that scene and get it. There's not enough light on it. Somewhere around ten seconds into the nude scene, there are two beacons, somewhat similar in function to a – a police revolving light that, total additional amount of wattage of those two is 2600 watts. So that at the peak, lighting of the nude scene compared o the 36,800, there are 7600 watts of light on that stage.

I will not sit here and tell anyone that you cannot see those forms, but the only thing I can say in defense of that scene is that it is the closest thing to a live, nude painting that I have ever witnessed. It is X number of [325] bodies standing totally still on that stage. That, I think, covers the nude scene for all purposes.

Q All right, sir. There's been some reference to the language involved. If the language were excised, taken out, would this have any change in the effect of the portrayal of the play?

A Yes, I believe that and I believe it very strongly that it would change – when a playwright writes a play and depicts people, it would be as foolish, I would think, since theatre is somewhat of an exaggeration of real life, for them to place in a play a construction worker and have him speak in the speech of a Harvard Law School graduate. The language that is utilized by the cast of "Hair" is that language which is now commonly referred to as street language. But it also has become the language of some segment of the young population of today. I do not believe that the four letter word "fuck", since it's been said, denotes the sexual act but rather that which – that of anger or that of emphasis or that of hostility, if it were, rather than, you know, in the connotation of the act. I believe that if the language of the play or the language of

the characters in the play were changed, it would totally change the characteristic of the work.

If, for example, you put the arms back on the Venus de Milo, would you still have the Venus de Milo? I [326] mean, if that is an analogy for anyone to make.

Q All right, sir. This hypocrisy that you say the play deals with, is this the hypocrisy of X-rated movies, sitting down and people secretly going to see those and stag films and things of this nature while at the same time denying that they see these things?

A Well, I think it deals with that. I think it deals with, and strangely enough, you know, when they talk about free love, I think to some degree it discusses – most people in that terminology are discussing sex without the bond of matrimony. I think one of the things that the youth today feel is that is that any worse or better, more or less hypocritical than the guy who is married and goes home but has somebody on the side. I do not know if this is a common phenomenon but I do know, incidental to my travels, that it does occur and I think to some degree what the kids are trying to say is if you are going to get married, then do it, but make it stick. If it is only for the purpose of sex, then question the validity of getting married. I don't necessarily think that in a country in which the divorce rate has risen incredibly over the past ten years that this is such an idiotic question to ask. I think that's, you know, realistically what we are talking about.

Q Why the simulated sex acts?

A Well, I think a lot of it is poking fun at what, [327] when we were raised with, and "we" being my generation, as being bad, as being dirty, as being wrong. Counsel for the defense has kept referring to the act of the gesture of masturbation. I must truthfully admit that I

do not find as many simulated sex acts as they did. However, in explaining this, there is, you know, a dance performed by a great number of ballet companies. It is commonly called a nude pas de deux, which means two dancers nude on stage doing a ballet. I would not consider this a simulated sex act basically because there is no sexuality to it.

I do think, for example, and I think maybe with the masturbation act I can generalize to some degree and that is I was raised that masturbation was wrong, that it was – that it would lead to blindness or whatever, I mean, all the old cliches; and to some degree, theatre bases itself on cliches and I think they are literally lampooning, poking fun at, satirizing those beliefs.

Q Now, to your knowledge, is the foreign production of "Hair" different than this play in the United States?

A As with most productions, when an author writes a play, when three people create a musical, certain specific rights are given in a contract and certain specific rights are withheld, not from the producer necessarily but for a control factor, although the new "Hair" could have participated in the profits of the London production, they had [328] absolutely no artistic control. I do know that I went to London. I saw the London production. I came back and I screamed. We screamed loud enough here that there were certain changes made.

However, you know, the limitation of art – and I am speaking of "art" in the sense of "Hair's" power was very, very limited by the London ownership. The London – it was owned by an Englishman. There were certain things in it that I found objectionable which, you know, need not be enumerated here, I don't believe. But we had no artistic control. "Hair," the people who control the production that is being talked about in this courtroom is not

controlled by the same people that control the London production.

Q All right, sir. Now, to your knowledge, have you ever seen or have you ever heard of a production of "Hair" in this country where a poster – large poster or any type poster of Jesus was on stage?

A Absolutely not. It is not part of the original design nor is it part of any design of any production which I have ever seen.

Q All right, sir. How long has it been since "Hair" has put out programs with the biographical sketches involved?

A I would be honest to admit in court that I haven't checked this particular factor. The program which [329] has been presented in evidence in this courtroom and displayed to the jury has – was not printed after August 1st of 1969 and has not been for sale in the theatre and I might add that that particular program is – was up, until August 15, 1969, only for sale in the Broadway production. It was a for sale souvenir book and not the souvenir program that is handed out as you walk in the theatre. Since the time of August 15, 1969, a souvenir program has been devised with absolutely no bios of any performer in it. It only contains the bios of the authors, producer, the set designer, similar type people.

Q Are any of these players depicted in this program which has not been used since August, 1969, in the current production?

A No, sir.

Q Now, this is why, when Mr. Thrasher testified that he saw it a year and a half ago or two years ago, we knew that this was impossible for him to pick up this program?

A Yes, sir. When Mr. Thrasher stated that he saw the show a year and a half ago or two years ago, I immediately

checked because I knew that that particular program had not been used since the San Francisco company had opened. I knew approximately that date and, therefore, I knew it was impossible for him to have purchased it at the time he thought he saw the show.

[330] Q Has this particular production played Memphis and Nashville?

A Yes, it has played both cities.

Q Has it played Nashville more than once?

A Yes, it has played Nashville twice.

Q Has anyone ever threatened prosecution or anything of this nature?

MR. NELSON: We object to that, your Honor, it's not –

MR. ALLEY: All right.

MR. NELSON: – to be considered by the jury.

CROSS EXAMINATION

BY MR. NELSON:

Q Mr. Cherin, if this production is permitted to go forward, declared not to be obscene and for other reasons given permission to play, how much money do you stand to make?

MR. ALLEY: Your Honor, I object.

THE COURT: He may testify as it may or may not have something to do with his credibility and weight.

MR. NELSON: Think it has to do with his interest in the matter.

THE COURT: Yes.

A What is Southeastern's potential profit, is that what you are asking me?

[331] Q That's correct.

A Well, I would say, you know, probably at the moment is around ten, $11,000.

Q You stand to make $11,000 this Sunday if this goes forward?

A Well, that, yes, I mean – means I won't lose – I mean, you know, I don't know what we are basing the figures on at the moment but that seems to be what you are looking for.

Q Now, then, Mr. Cherin, do you deny that there are many acts of simulated sex going on in this production?

MR. ALLEY: Your Honor, that's argumentative.

A Many? I don't, you know, I don't – I don't know what many –

Q (Interposing) Let's get a little bit specific here.

A Okay.

Q When the players say, believe it's on the insert, 2-8, "Fly United," do you deny that he and another player go across the stage with his front end in close proximity to the rear end of the female in front of him?

A Yes, do I deny it? No, I do not. I found it very funny.

Q That's true?

A Yes.

[332] Q Do you deny that in the first act that there is a scene where there is five men or four men and one woman, excuse me, sex scene where they are performing normal and abnormal sexual acts at the same time?

A Yeah, I deny that there are five people performing, in your terms, unnatural sex acts at the same time.

Q Okay. Let's put it this way, then, Mr. Cherin, where one man and girl get in embrace in a copulation position and another fellow comes up behind the girl and gets up close to her rear end and then two more males come up and get close to the rear end of the first fellow and the sec-

ond one gets in close proximity to him, do you deny that that happens.

A No, I do not deny that that happens.

Q You do not deny it?

A No.

Q Okay. Now, do you deny that there are several scenes where masturbation –

A (Interposing) No, I believe I admitted to that prior to this.

Q Do you deny that there is a scene where, believe it's Woof, one of the characters in the play lays down and performs acts on the poster of Mick Jagger?

A Acts?

Q He –

[333] A (Interposing) Are you calling kissing a sex act?

Q He lays down.

A Lays down flat on it? No, I don't deny that but I deny it's a simulated sex act, certainly.

Q Do you deny that while the song "White Boys" is being played that there are several, three I believe it is, white males underneath the stand where the singers are singing, thrusting their genital area up into the air?

A No. Are you saying below the stand, is that correct, sir?

Q Yes.

A Yes, no, I don't.

Q Fifteen or 20 feet down?

A No, I do not deny that.

Q I don't mean to trick you. Then, why, Mr. Cherin, did you, when you testified last November, represent to the Court that there was one sex act performed in the whole play, one simulated sex act?

A Well, your definition of simulated sex act and mine apparently differ, sir.

Q I will ask you if I didn't ask you at that time, "Is it not true that in many cases, very many natural and unnatural sex acts are simulated in this?"

You said, "Very many? No, I would not consider [334] it very many but there are some. I believe in one scene there is a natural sex act simulated for about two and a half seconds."

A I was referring basically, you know, to the scene called "the bed" which I consider an overt simulated sex act.

Q That's one I just left out, I believe.

A It probably is, I certainly, you know –

Q (Interposing) But that's the only one you could think of at that time?

A That's what – that's what I consider an overt simulated sex act.

MR. ALLEY: The question was natural. He's been asking him about unnatural.

MR. NELSON: I am asking him about both, your Honor.

Q Now, then, Mr. Cherin, turning to the – one other question, I believe, at that hearing, you also testified that as many as 28 players appear on stage nude.

A No, I believe the question that was asked, sir, was how many could and I believe your Honor asked that question and I said, "There are 28 people in the company and it is hypothetically possible," what I just stated, if you are attempting to challenge my credibility, what I just said was that the most I had ever seen.

[335] Q I will ask you if I didn't ask you at that time, "Who appears on the stage nude in this play?"

You said, "Players."

I said, "How many players?"

You said, "The maximum is 28. That's the maximum number of people in the company."

A That's correct.

Q Then you went on to say, "Well, the normal procedure is that everybody does. However, I must explain that every performer every night is given the choice, I mean, there is no contractual obligations so we can't guarantee the number of nude players during that scene."

A That's correct.

Q But you answered at that time, "Well, the normal procedure is that everybody does."

A If that's what we are saying, I said the most I had seen, I believe, was 16.

Q Now, you have represented that the ideology in this play promotes certain social issues here. You listed the Vietnam War and you said that this play has changed the American attitude towards Vietnam. This play also depicts the sexual —

A (Interposing) I don't believe I testified that it did change.

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REDIRECT EXAMINATION

BY MR. ALLEY:

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[342] Q What, generally, are the critical acclaims of this play?

A Well, generally, as with any show that is a major hit, "Hair" is the biggest hit in Broadway history. That is significant on two factors: One is that the number of people that have seen it; and, two, the amount of per-

formances over all, counting of performances that the show has ever been played. It has played more performances and been seen by more people than any show in the American theatre history, I guess, world theatre history because American shows have the longest running and greatest audiences.

Cliff Barnes called it the biggest break — Cliff Barnes is the critic for the New York Times — and called it the biggest breakthrough, I believe, in the past 25 years in the American theatre.

Generally, let me say that the notices have been very good to out-and-out raves. I would be unfair in saying this, we have been hit a couple or three X number of times but, generally, any big hit show cannot survive without audience reaction or audience like, you know, in other words, after you get review there is the word of mouth. If the audience doesn't like the show, you die even if you get raves.

I cannot believe that its success is based on the [343] nudity or the four letter words since we are now all very aware that there are more shows than you can count on both hands in New York with nudity and four letter words and the defense's interpretation of simulated sex acts.

Q At one time were not four of the songs from "Hair" in the top ten in popular charts of our nation?

A Yes, that is correct. At one time, "Hair" set a press — or made history by having four songs in the top ten. One of the songs from "Hair" was also used as the Peace Corps, whatever you call it, the Peace Corps song. One of them was used as the summer festival in Boston in 1970, I believe, as their official song.

Q Did not the album "Hair" win the Grammy award?

A Yes, it did and that, of course, includes the number "Abie's Baby," on it.

Q And this is the same record that we heard?

A Yes, it is.

Q In court?

A Yes, it is identical, it is the same record.

MR. ALLEY: That's all.

• • •

TESTIMONY OF LEIF CARTER

DIRECT EXAMINATION

• • •

[348] BY MR. ALLEY:

Q Where do you live?

A Signal Mountain.

Q What is your occupation or profession

A I teach Political Science at the University here.

Q Nashville?

A University of Tennessee at Chattanooga.

Q What is your educational background, sir?

A I graduated from law school in 1965. I am finishing work on a dissertation for the FDT in Political Science of the University of California at Berkeley.

Q Did you have an occasion to see "Hair"?

A Yes.

Q How long ago, sir?

A That was in August of 1970.

Q Just when you were in school at the University of California —

A (Interposing) That's correct.

Q — you just referred to? All right, sir. What social issues did the play comment on that you recall, sir?

A Well, very clearly, the play commented on the problem of pollution, the problem of racism, the question of violence in our society, the war in Vietnam. The play raised issues regarding personal conduct in the area of sexual behavior and in the area of drug use.

[349] Q Was there any humor in the play, sir?

A Yes, sir, indeed.

Q Were issues such as sex, racism, et cetera, performed in a spoofing, satirical manner?

A Often they were, yes.

Q In the production you saw, was there any nudity?

A Yes, there was.

Q At what point did it occur?

A As I recall, it occurred at the end of the first half of the play where the — some members of the cast appeared more or less immobile in a rather darkened stage for, I would guess, no longer than 15 or 30 seconds.

Q Did you enjoy the play?

A I enjoyed most of the play. I suppose I expected a little more than I found. In some ways I was disappointed in the play. Seemed at times rather disorganized. At times I just lost the message. I felt part of the play was superficial, trivial, irrelevant, but on the whole I am glad I saw it, yes.

Q Did you feel that parts of the play had social redeeming value?

A There is no question that the play is attempting to communicate a message that many people feel are important messages, important issues, and certainly the play, the major emphasis of the play was to try to say something about [350] these social issues, yes.

Q Would you say that the play does express the ideas of a significant portion of contemporary youth?

A I couldn't give you statistics on that but in my own experience, certainly, I see many students, many young peo-

ple who are very much concerned with the issues that "Hair" raises. They do not necessarily agree with the positions that the play occasionally takes but they do think those are significant issues and they would undoubtedly feel the point of view that the play "Hair" raises is a point of view that is worth considering.

Q Do you attend many plays, sir?

A I haven't attended very many plays lately. I would guess my wife and I get to, oh, maybe two plays a year.

MR. ALLEY: Thank you.

• • •

[430] MR. ALLEY: Your Honor, I believe I have previously indicated that the testimony that was heard on, I believe it was, November the 4th early in this same proceeding should go into evidence and with that, the plaintiff has no further evidence.

THE COURT: All right.

MR. NELSON: The defense has no further evidence either, your Honor.

THE COURT: All right. Suppose we take a recess until we hear from the jury and then we will proceed with any further argument counsel wishes to make. First, perhaps before we recess, is there further argument that you wish to make with regard to any issue or issues apart from the issue of obscenity.

MR. NELSON: We have one argument, your Honor, on Proprietary vs. Governmental Function.

THE COURT: All right. You wish to make your argument at this time?

MR. NELSON: We would like to bide a little time, if we could, your Honor. If I could explain the reason why, [431] when we got back to the office yesterday afternoon, we had received a long distance telephone call and had

been informed that the Federal District Court in Oklahoma City had ruled on this question favorably to the defense and we had requested an air mail special delivery copy of the opinion. And while we realize that it is not binding upon this Court, we think it is proper matter for the Court to consider and we would like to have all the time we could to get it in here.

THE COURT: Well, those are matters you could get into the Court whenever you receive it; but I don't think that's a matter we should delay argument for.

MR. NELSON: Very well.

THE COURT: You wish to make oral argument now apart from that?

MR. NELSON: We have, in our original motion to dismiss, stated that we feel the complainants have not stated a cause of action because they have not shown that they have a "right to a lease of the City Auditorium Board." It has long been the rule, even assuming First Amendment rights here, which we do not but we will for the purpose of this argument, that before someone has a right to claim freedom of speech, he must show that he had — that the person who was denying him that freedom of speech has the duty to give him this particular forum.

As to this proposition at law, we would cite [432] Avins vs. Rutgers in our brief wherein it was said that:

"The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression," nor does "freedom of speech comprehend the right to speak on any subject at any time." Thus "One who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which he wishes to speak."

The Avins case was one where a state supported law review denied the use of its pages.

THE COURT: Let's have the jury return. They made the question as to whether or not they are to decide one or two in regard to issues or whether just decide either one or two.

Well, just a moment. Now, gentlemen, of course, the instructions the Court will have to give is that they should decide both issues. By agreement, I can send that instruction as a written instruction to the jury or if you would prefer, I can bring the jury in the courtroom and give that instruction.

MR. ALLEY: Of course, your Honor, I have already objected to the second part of that charge and that objection still stands for the record, so as far as whether you should bring them in or send it back, I have no objection to you sending it back.

• • •

[434] Does that clarify the instructions of the Court? Be your duty, as I say, to decide both issues.

THE FOREMAN: It's possible to be – vote obscene in one and not obscene in the other without –

THE COURT: The verdict may be –

THE FOREMAN: – contradictory?

THE COURT: Your verdict may be obscene or not obscene upon one and it may be obscene or not obscene upon the other and your verdict upon one would not govern your verdict upon the other; rather, your verdict on each issue will be governed accordingly to the evidence as it pertains to that issue and in accordance with the instruction of the Court as to the law pertaining to that issue.

(Thereupon, at 11:01 o'clock a.m. the jury retired to further deliberate upon its verdict, and in its absence the following further proceedings were had, to wit:)

THE COURT: All right, proceed.

MR. NELSON: As I was saying, your Honor, I cited the case of Avins vs. Rutgers, which states that:

[435] "One who claims that his constitutional right to freedom of speech has been abridged must show he has a right to use the particular medium through which he seeks to speak."

THE COURT: What is the citation?

MR. NELSON: 385 Fed. (2d) 151, 1967.

Another case in point is that of Nashville Broadcasting Company vs. United States, 319 U.S. 190, 87 Lawyers Edition, 1344. That was a case dealing with the use of radio facilities. Justice Frankfurter, speaking for the court, said that "Freedom of utterance is abridged to him who wishes to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

Similarly –

THE COURT: (Interposing) Well, is that really relevant to the issue here? This is a governmental body, distinction is the private organization and is subject to certain governmental regulation.

MR. NELSON: I was just going to point that out that the National Broadcasting Company is subject to the Federal Communications Systems Rules and Regulations and in that respect is governed by the Federal Government.

[436] I can see your Honor is concerned with the application of municipalities as a part of the State.

THE COURT: Yes, the First Amendment does not apply, does it, to private enterprise or to private theatre? I don't suppose private theatre would have the same problem that confronts the city here.

MR. NELSON: That is absolutely correct, your Honor. I think on this, of course, Tennessee law would be — see what the rights and duties of private corporations and so forth are and I have cited in my brief a 1912 case wherein it says that, of course, any citizen has a right to manage and control and improve his property as he may see fit. The question then becomes what is the status of the City of Chattanooga in that regard?

Now, the Courts have long recognized a difference, particularly in the tort field between governmental activities and proprietary activities. Our Tennessee courts have indicated that no governmental facility may be rented except in a proprietary capacity. I have cited that in my brief. Similarly, it is law across the county; but by far the majority of states that the leasing and use of an auditorium facility is a proprietary capacity.

Now, when we are speaking of proprietary capacity as opposed to governmental capacity, we get to the point where the proprietary capacity of the city is governed by [437] the general rules under the laws of Tennessee that govern private concerns. In our case — in our brief we have cited the case of City of Knoxville vs. Heth, wherein it is said that it is conceded that the city, in the operation of utilities herein does so in proprietary or individual capacity rather than its legislative or governmental capacity. It is thus governed for the most part by the same rules that control a private individual or business corporation.

THE COURT: Now, is that true, in your opinion, where constitutional rights are involved? For example, assuming that a city is operating in a proprietary capacity, does that mean that they could show preference, then, to one political body and discriminate against another political body?

MR. NELSON: We would take the position they would

have the same rights as any individual business owner in leasing their proprietary buildings. The Auditorium, for instance. Now, where they are holding something in a governmental capacity, public park or —

THE COURT: (Interposing) Is it your position, then, for example, that the Auditorium Board could admit the Democratic or the Republican party to the Auditorium and exclude the other party?

MR. NELSON: I think they could, your Honor, I [438] think as a matter of political expediency and practice, they would not. Certainly the governmental —

THE COURT: (Interposing) Well, is it your opinion, then, that the City of Chattanooga could admit Protestants and exclude Catholics, for example, in the Auditorium?

MR. NELSON: Once again, I think here we are going to the —

THE COURT: (Interposing) Here you are dealing with constitutional rights, aren't you?

MR. NELSON: Yes, you are dealing with constitutional rights but, once again, you are getting back to can they do it in their governmental capacity or proprietary capacity. Now, as to a public building, city hall or something like this, I think your Honor has a very good point; but where we are operating a proprietary capacity and there is no question but what we are here, then we are governed by the same rules that control a private individual or business corporation.

THE COURT: If you operate a golf course, for example, as a municipal golf course, could you discriminate on that golf course?

MR. NELSON: No, your Honor. I believe the Courts have held that's a governmental capacity.

THE COURT: Operate a swimming pool, could you,

[439] as a municipal swimming pool, could you discriminate?

MR. NELSON: Once again, I think recreation is a health activity which is a governmental function, your Honor. I don't think we can definitely discriminate in something like that.

THE COURT: All right.

MR. NELSON: I think one thing that is troubling your Honor is that the municipality receives its power from the State in whatever it does and thus I can see where you might be troubled by interpreting its proprietary capacities because it is granted these powers by the State. But we would also similarly point out that any private corporation is chartered by the State of Tennessee. That is the law of Tennessee. And, certainly, I have never heard it espoused in any court that a private corporation is governed by the same laws and governed by the laws the city would be, under governmental capacity as to the due process clause and equal protection clause. Private corporations are just that, private corporations and the city, in operating its proprietary functions, is operating as a private corporation under the laws of Tennessee.

THE COURT: All right. Anything further? All right. Briefs, of course, have been submitted upon all these issues.

• • •

MEMORANDUM OF DISTRICT COURT

(See Petition for Certiorari pp. 28-55)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

ORDER

(Filed April 7, 1972)

The plaintiff, Southeastern Promotions, Inc., seeks by this action to obtain a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 regarding the plaintiff's right to lease a municipal theater or auditorium for use in presenting a commercial theatrical production known as "Hair." Jurisdiction is averred to be based upon 28 U.S.C. §§ 1332 and 1343 (3) (4). The plaintiff seeks by way of relief a mandatory injunction requiring the defendants, as members of the Municipal Auditorium Board for the City of Chattanooga, Tennessee, to lease the theater or auditorium under its management to plaintiff for a specific date. The case is before the Court upon the original complaint as amended, the defendants' motion to dismiss, the defendants' answer, the record made upon the trial of the case, including the verdict of an advisory jury, upon all of which the Court has now entered its memorandum opinion. For the reasons set forth in the memorandum of the Court, the Court is of the opinion that the defendants acted within their lawful discretion in declining to lease the Municipal Auditorium and/or the Tivoli Theater unto the plaintiff.

It is accordingly ORDERED that this lawsuit be and the same is hereby dismissed with full prejudice.

APPROVED FOR ENTRY.

(DULY CERTIFIED)

/s/ FRANK W. WILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION
[Title Omitted in Printing]

NOTICE OF APPEAL

(Filed April 7, 1972)

Notice is hereby given that Southeastern Promotions, Inc., the above-named plaintiff, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the decision of this Court, finding that the stage production "Hair" is not protected by the First Amendment of the United States Constitution, entered in this action on the 7th day of April, 1972.

JOHN ALLEY
510 Maclellan Building
Chattanooga, Tenn. 37402
Attorney for the Appellant

(DULY CERTIFIED)

OPINION OF THE COURT OF APPEALS

(See Petition for Certiorari pp. 56-58)

ORDER DENYING SUGGESTION OF REHEARING EN BANC AND PETITION FOR REHEARING

(See Petition for Certiorari pp. 69-76)

Supreme Court, U. S.
FILED
JAN 17 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD., Petitioner

vs.

STEVE CONRAD, ET AL., Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EUGENE N. COLLINS and
RANDALL L. NELSON
Counsel for Respondents
400 Pioneer Bank Building
Chattanooga, Tennessee 37402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents in this cause respectfully submit that no Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals For The Sixth Circuit which affirmed the judgment and opinion of the United States District Court, Judge Frank Wilson presiding.

OPINIONS BELOW

The opinion of the Court of Appeals filed May 30, 1973, and its opinion on Petition to Rehear With Suggestion for Rehearing En Banc, filed October 30, 1973, are reported at 486 Fed. 2d 894 and are appended to the Petition for a Writ of Certiorari. The opinion of the United States District Court For The Eastern District of Tennessee, Southern Division, is reported at 341 F.Supp. 465 (1972).

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

May a municipal auditorium board refuse to lease the auditorium for a production which would avowedly violate laws against public nudity and the performance of obscene acts in public places, and which would thereby also violate the terms of the form lease upon which the municipal facilities are standardly let.

CONSTITUTIONAL PROVISIONS INVOLVED

Plaintiffs-petitioners aver that the First and Fourteenth Amendments are involved, which defendants-respondents deny, averring that the police power gives them the right to proscribe the conduct involved in a municipal facility.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

On September 11, 1970, the plaintiff requested of the defendant auditorium board the right to lease the Tivoli

Theatre, a privately owned theatre under lease to the City of Chattanooga, at some indefinite subsequent time to present performance (s) of "Hair." The request was denied. Again, on April 2, 1971, the same request was again made and denied. Upon October 29, 1971, the request was again made, this time specifying the dates of November 23-28 as the desired time for the exhibition. The request was again denied, and this action was brought two days later, just three weeks and one day before the desired dates. The Complaint ftself averred, *inter alia,* that nudity would occur.

Plaintiff's original pleading sought: (1) a temporary restraining order enjoining the auditorium board from leasing the Tivoli on the dates in question, and (2) preliminary injunctive relief to grant the ultimate relief sought, an injunction enjoining defendants mandatorily to contract with the plaintiff for the use of the appropriate Tivoli Theatre facilities during the period mentioned above "upon normal, standard and customary terms and conditions for like performances of musical stage plays." (Complaint, pp. 7-8)

On November 4, 1971, a show cause hearing was held during which the board interposed, *inter alia,* the defense that the exhibition sought to be performed, even under the allegations of the complaint, would violate certain ordinances of the City of Chattanooga, and thereby would violate the very terms of the standard lease plaintiff was seeking.

For reasons set forth in the Court's Memorandum Opinion of November 8, 1971, the preliminary relief prayed, which was in effect the ultimate relief sought, was denied (Order of Nov. 9, 1971). Thereafter, the auditorium board filed a motion to dismiss. Two of the grounds relied upon by the board in its motion were: (1) that

the complaint failed to state a cause of action in that the plaintiff had no right to contract with the board because it had averred that acts would be performed in public which violated both ordinances of the City of Chattanooga and the common law of Tennessee on indecent exposure, and that said acts would thereby be a violation of the terms of the standard lease; and (2) that the complaint failed to state a substantial federal question or constitutional issue.

The motion to dismiss was taken under advisement by the Court; and thereafter, on March 16, 1972, plaintiff amended its complaint to request the booking date of April 9, 1972, at the Memorial Auditorium, and the plaintiff further asked for an expedited hearing. Subsequently, on March 23, 1972, the judgment on the motion to dismiss was reserved; the defendants were given just ten (10) days in which to answer; and the cause was set for hearing on the 10th day, April 3, 1972.

Defendants' answer was filed March 31, just eight (8) days later, in an attempt to give both the Court and opposing counsel notice of their defenses in advance of the hearing, and while relying on the motion to dismiss, the answer averred, *inter alia,* (1) violations of the obscenity laws of the city and state would occur if plaintiff were successful; (2) that no First Amendment rights were involved because the First Amendment does not protect conduct which is contrary to a valid state law upholding a substantial state interest; and (3) that the First Amendment does not protect obscene conduct such as that plaintiff sought to exhibit to the public.

The cause came on to be heard on April 3, 1972, and the ensuing days. Issues were then submitted to an advisory jury, empaneled by the Court, they being: (1) whether the production "Hair" was obscene within the

definition of obscenity as it relates to freedom of speech under the First Amendment; and (2) whether conduct, apart from speech or symbolic speech in the production "Hair," was obscene within the definition of obscenity as it relates to conduct.

Both the advisory jury and the Court found that the production "Hair" contained conduct, apart from speech or symbolic speech, which rendered it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances of the City and of the statutes of the State of Tennessee. This conduct was, in fact, never denied by plaintiffs. It was, therefore, held that the defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium and the Tivoli Theatre to the plaintiff.

Further, the Court held that even on the assumption that the alleged communicative element of the exhibition brought into play the First Amendment, the laws in question met the tests set forth in *U. S.* v. *O'Brien,* 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), and that the defendant board was justified in denying plaintiff access to the auditorium.

B. Proceedings In The Court Of Appeals.

On appeal from the District Court, the Court of Appeals affirmed the judgment on the opinion of the District Judge, with both Judges Weick and O'Sullivan adding comments after adopting the opinion of the District Judge. It found the conduct, the language used, and the play itself all obscene. Plaintiffs filed a Petition to Rehear with a Suggestion For Rehearing En Banc. The Suggestion was overruled 7-2 and the Petition to Rehear denied by the same majority which originally affirmed the decision below.

BRIEF AND ARGUMENT

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

1. Circuit Courts of Appeal Are Not In Irreconcilable Conflict

Respondents respectfully submit that even though the Fifth and Tenth Circuits reached opposite results in other cases involving "Hair" as alleged by petitioner, than did the Sixth Circuit Court of Appeals in this case, the decisions are not in conflict because only in the case at bar was the *conduct* which would take place raised – this issue was not raised or decided in any of the three cases cited by petitioner *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.,* 459 F.2d 282 (10 Cir. 1972); or *Southeastern Promotions Ltd.* v. *City of Mobile, Ala.,* 457 F.2d 340 (5 Cir. 1972). Instead those decisions were decided on the bases that (1) a city could not decline use of its auditorium because the auditorium was operated as a proprietary function rather than as a governmental function, and (2) a city could not decline use of its facilities merely because its public officials did not care for the philosophical or ideological content of programs using the facility. In none of these decisions, to respondents' knowledge, was the illegality of the conduct occurring on stage, and particularly that which was not illustrative of any idea, speech, dialogue or theme of the production raised, and further, to respondents' knowledge, none of the other decisions involved the question of obscenity *vel non*.

Respondents herein also raised the issues on which their counterparts lost in the other jurisdictions, but they also asserted the "conduct" argument and brought into issue obscenity *vel non* which was not decided by the other courts mentioned. Even though the final results were opposite, since this decision was made on the additional grounds raised herein and not raised in the other cited cases, the Circuit Courts of Appeal are not in conflict. The District Court herein decided the issues raised in the Fifth and Tenth Circuits in accord with those decisions.

It should also be noted in this regard that the evidence introduced in the case at bar differed markedly from that in the other mentioned cases and appears, from the opinions, to be much more exhaustive. Since obscenity is a mixed question of law and fact, it is understandable that different courts could reach different results based upon the proof introduced before them. This too serves to reconcile the facially different results reached by the Sixth Circuit Court of Appeals.

Hence, it is respectfully submitted that the Courts of Appeals are not in irreconcilable conflict and it is not necessary to further resolve this matter.

2. The Issue Is Not of Enough Significance to Justify Review

The petitioner alleges that the issue is one of great importance to the American theatre but fails to specify which issue is important to the theatre: what obscenity standards may be applied to the theatre or whether judges may find conduct obscene without having seen the conduct involved.

If it refers to the latter, respondents are unaware of any decision of any court declaring that a judge must himself see conduct before declaring the conduct illegal or punishing a violator of laws proscribing illicit conduct.

Further, the allegation that the Court must see the production seems particularly inappropriate in the instant case, in that plaintiff herein never moved, requested of, or in any way mentioned to the District Judge that he should see the production. Instead, petitioner, by demanding immediate trials and expedited hearings both times it came before the District Court never gave the Court time to see the production. The record reflects that initially defendants and the Court were given only five days notice before a show cause hearing was held and then after defendants later filed a Motion to Dismiss, part of which was eventually sustained, but while said Motion was pending, plaintiff again came to the Court and asked for and was given an expedited hearing. Obviously, plaintiff's deliberate "last minute" tactics impaired any opportunity the Court might have had to see the play and plaintiff cannot now be heard to complain.

Further, and even more ruinous to the petitioner's position, is that it alone was in control of the acting company and it alone could have brought the players in for a private showing for the Court. Yet despite the fact that petitioner alone had the power to provide the Court this evidence, it chose not to do so. It goes without saying that theatrical productions, unlike obscene books and movies, are not available to both sides. It having been within the power of plaintiff to provide this evidence, and it not having done so, petitioner cannot now be heard to complain. *Transamerica Ins. Co.* v. *Bloomfield*, 401 F.2d 357 (6th Cir. 1968).

If, on the other hand, petitioner is alleging that it is of importance to the theatre to know whether any act that it cares to portray on stage *ipso facto* becomes enshrouded

by the First Amendment, that issue has been passed upon by this Court. In *Paris Adult Theatre I* v. *Slaton*, — U.S. —, 37 L.Ed.2d 446, 93 S.Ct. —, this Court said:

> "*Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a* bar or a *'live' theatre stage*, any more than a 'live' performance of a man and woman locked in sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue." (emphasis supplied)

The District Court and Court of Appeals both herein found that many illegal and obscene acts occurred in the production which did not relate to any free speech involved, just as in the example this Court cited in *Paris Adult Theatre (supra)*. The District Judge went on to hold:

> "It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment."

This Court has often held that the mere fact that free speech is intermingled with illegal conduct does not bring with the free speech constitutional protection for the conduct. *Cox* v. *Louisiana*, 379 U.S. 536, 13 L.Ed 2d 471, 85 S.Ct. 453 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 13 L.Ed.2d 487, 85 S.Ct. 476, reh. den. 380 U.S. 926, 13 L.Ed.2d 814, 85 S.Ct. 879 (1965); *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949); *U. S.* v. *O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968); *Paris Adult Theatre I* v. *Slaton*, *supra*; *Cameron* v. *Johnson*, 390 U.S. 611, 20 L.Ed.2d 182,

88 S.Ct. 1335, reh. den. 391 U.S. 971, 20 L.Ed.2d 887, 88 S.Ct. 2029.

Furthermore, in *Miller* v. *California*, — U.S. —, 37 L.Ed.2d 419, 93 S.Ct. — (June 21, 1973), this Court stated:

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accomodation any more than live sex and nudity can be exhibited or sold without limit in such public places.[8]"

> "[8] Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States* v. *O'Brien*, 391 U.S. 367, 377, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968) a case not dealing with obscenity, the Court held a State regulation of conduct which embodied both speech and nonspeech elements to be sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherence of that interest.[1] See *California* v. *LaRue*, 409 U.S. 109, 117-118, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972)."

In this regard it is of great importance to note that, even though the decision in the case at bar pre-dated *Miller* by more than a year, the District Judge specifically found that the laws relied upon by respondents met all of the standards laid down in *United States* v. *O'Brien*, and that respondents refusal to contract with petitioner was therefore sufficiently justified.

Hence, it is respectfully submitted that this case presents no new issues to this Court significant enough to justify review, and clearly the judgment is supported by the case law of this Court.

3. The Standards Applied Are Not Inconsistent With Previous Decisions of This Court

Petitioner further alleges that this Court should grant certiorari because of an alleged lack of constitutionally accepted standards governing use of the auditorium. Then petitioner forgot to mention that portion of the lease (p. 35, l. 28 of Petition for Certiorari) which requires all lessees to abide by all state and local laws, which laws include those footnoted to the District Court decision and which appear on page 36 of the Petition for Certiorari.

That the defendant board has not exercised an unfettered discretion as alleged by petitioner is obvious. Certainly there is no impermissible vagueness or indefiniteness in an ordinance which prohibits public nudity, and there can be no question that public nudity occurs in "Hair" — this was admitted in the Complaint. Where is the vague standard?

Similarly, lewd, indecent and obscene acts in a public place are proscribed (see Ordinance 25-28). This is almost exactly the same language of the statutes upheld in *Roth* v. *U.S.*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), the only difference being that there they were applied to written material whereas here they are applied to conduct. The appellant in *Roth* argued that the words, "obscene", "lewd", "lascivious", "filthy", and "indecent" were not sufficiently precise, but this Court expressly rejected this contention, citing extensive authority (354 U.S. 491, 492, 1 L.Ed.2d 1510, 1511). As the Court there said:

> "These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . That there may be marginal cases in which it is difficult to de-

termine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.' "

Here there can be no doubt that these words and standards apply to the conduct in "Hair". This is not even a marginal case. The jury, after being properly instructed, the District Judge and the Court of Appeals concurred with the board. It is therefore manifest that the board's action was neither arbitrary nor capricious.

The standards having been adequately set forth and being sufficiently precise, particularly with respect to the conduct in "Hair", it is respectfully submitted that appellant's argument in this regard is without merit.

4. Mootness

Upon information and belief, respondents submit that the issues involved in this case are now moot. It is respondents information that the road company, the Venus Company, which was playing "Hair" and which was to come to Chattanooga if plaintiff had prevailed, has now gone off the road and is no longer playing "Hair."

The testimony below was that it was not until October or November of each season that it could be determined whether a road show would continue to draw large enough audiences to make it financially feasible to continue for the full season. Respondents are informed that plaintiff did not show "Hair" at Chattanooga's sister city of Knoxville, Tennessee. Even though under threat of a lawsuit by plaintiff herein, that city had agreed to and did set aside a week of scheduling at its auditorium last January, but plaintiff failed to stage its production.

This being the case, it is respectfully submitted that the dismissal of this cause should be allowed to stand.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari should not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

EUGENE N. COLLINS
400 Pioneer Bank Building
Chattanooga, Tennessee 37402

RANDALL L. NELSON
400 Pioneer Bank Building
Chattanooga, Tennessee 37402

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
PETITIONER,

v.

STEVE CONRAD, ET AL.,
RESPONDENT.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

JOHN ALLEY
Northgate Professional Building
Chattanooga, Tennessee

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

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We deeply regret burdening this Court with a reply brief but respondents have raised the surprising argument that this case is moot (pages 12-13). Nothing in the record supports that contention, and the argument is without foundation. Respondents raised this same argument in the closing paragraph of their brief when the case was before the original panel of the Sixth Circuit. Petitioner thereupon filed an affidavit stating that it fully intended to produce HAIR in Chattanooga. That affidavit went uncontradicted, and accordingly, no judge in the court of appeals made reference to any question of mootness. And in opposing a petition for rehearing *en banc* respondents made no reference to mootness. Now, however, in opposing the petition for certiorari, this bogus issue is raised once again.

Counsel have been in constant touch with petitioner in this case and have been repeatedly informed that, in order to vindicate their constitutional rights, they intend to show HAIR in Chattanooga. We, therefore, are prepared to file yet another affidavit that if successful on this appeal petitioner will present this play.

I.

Since petitioner fully intends to produce HAIR in Chattanooga there is no substance to the contention of mootness. A case is not moot so long as there is a "live controversy" between the parties. *Hall* v. *Beals*, 396 U.S. 45, 48; *Powell* v. *McCormack*, 395 U.S. 486, 495-500, 517-18. That a "live controversy" exists here is, we submit, beyond contradiction. Plaintiff intends to file a new application seeking another date. There is, therefore, a substantial probability that this controversy will recur; indeed, it is apparent beyond any rational doubt that it is certain to do so. It is plain, therefore, that a "live controversy" exists between the parties "If [defendants] were likely to repeat [their] allegedly illegal conduct the case would not be 'moot'." *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406; see also *Diffenderfer* v. *Central Baptist Church of Miami*, 404 U.S. 412, 417; *Sanks* v. *Georgia*, 401 U.S. 144, 151 (possibility of future injury means that case is not moot).

Carroll v. *The Commissioners of Princess Anne County*, 393 U.S. 175, is particularly instructive here. There a state court had issued a temporary restraining order *ex parte* against a demonstration. On appeal the state court refused

to pass upon the constitutionality of the restraining order on mootness grounds because the order had long since expired. The Court reversed:

> "We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities. In these circumstances, our jurisdiction is not at an end.
>
> "This is the teaching of Bus Employees v. Missouri, 374 US 74, (1963), which concerned a labor dispute which led to state seizure of the business. This Court held that, although the seizure had been terminated, the case was not moot because "the labor dispute [which gave rise to the seizure] remains unresolved. There thus exists . . . not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, bu the presence of an existing unresolved dispute which continues. . . ." Id., at 78.
>
> "In Southern Pacific Terminal Co. v. ICC, 219 US 498, (1911), this Court declined to hold that the case was moot although the two-year cease-and-desist order at issue had expired. It said: 'The questions involved in the orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review' . . ."
>
> "These principles are applicable to the present case.

> The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings."

See also *Diffenderfer* v. *Central Baptist Church of Miami*, 404 U.S. 412, 417.[30]

Carroll recognizes the important fact that great damage to first amendment rights will result if local officials are permitted to take unconstitutional action and then to insulate themselves from effective appellate review. And its teachings are directly relevant here, for defendants' conduct will be repeated, and accordingly, it will have an impact on the future dealings between the parties. "If [defendants] were likely to repeat [their] allegedly illegal conduct, the case would not be moot." *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406.

II.

Even if petitioner no longer intended to produce the play, this case would not be moot. There is no doubt that the dispute was a live one when suit was commenced. Even if petitioner no longer sought access to the municipal auditorium, the original denial of permission would fall squarely within the doctrine of "short-term orders, capable of repetition, yet evading review". Numerous recent decisions of this Court indicate that in these circumstances, especially where fundamental interests are at stake, the doctrine of mootness does not operate to bar appellate review. *Brown* v. *Chots*, 411 U.S. 442 at n.5; *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5; and *Roe* v. *Wade*, 410 U.S. 113, 125. The cases are analyzed by one

of counsel in a recent article, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1383-86 (1973). Surely, in any event, the question of whether in these circumstances the case is moot is itself one of far reaching importance, and itself "certworthy". While, happily, that issue need not be resolved in this case, we are prepared to brief and argue the point should the Court so desire.

III.

Finally, if the case were, in fact, moot that provides no basis for denying certiorari. The appropriate course of action would be to grant certiorari, vacate the judgment below, and pass an order that the case be dismissed. *United States* v. *Munsingwear*, 340 U.S. 36, 39.

Respectfully submitted,

JOHN ALLEY
Northgate Professional Building
Chattanooga, Tennessee

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts

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STEVE CONRAD, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

JOHN ALLEY
4845 Hixon Pike
Hixon, Tennessee 37343

GERALD A. BERLIN
73 Tremont Street
Boston, Mass. 02108

HENRY P. MONAGHAN
10 Post Office Square
Boston, Mass. 02109

Blanchard Press, Inc., Boston, Mass. — Law Printers

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the district court is reported at 341 F. Supp. 465 (E.D. Tenn. 1972) and appears in the petition for certiorari at pages 28-55. The original opinion of the court of appeals and the opinion of the court denying rehearing are reported at 486 F.2d 894, and they appear in the petition for certiorari at pages 56 and 69, respectively.

Jurisdiction

The judgment of the court of appeals was entered on May 30, 1973. A timely petition for rehearing and suggestion of rehearing *en banc* was filed and was denied by the court on October 30, 1973. This petition for a writ of certiorari was filed on December 26, 1973, and it was granted by order entered on February 19, 1974. Jurisdiction is invoked under 28 U.S.C. § 1254.

Questions Presented

1. In denying petitioner permission to produce HAIR in the Chattanooga Municipal Theater because of its contents did respondents violate the first and fourteenth amendments to the constitution of the United States by utilizing constitutionally impermissible criteria under an ordinance which was wholly lacking in criteria and which did not require respondents to seek judicial review?
2. Did the courts below apply impermissible criteria in concluding that HAIR was obscene?
3. Does the record support a finding that HAIR is obscene?

Constitutional Provisions Involved

The first and fourteenth amendments to the Constitution of the United States.

Statement of the Case

A. *Introduction.*

HAIR is a musical which deals with the life styles of many young people and their attitudes on the Vietnam war, racism, sex, drugs, pollution, etc. Kevin Kelly, writing

in the *Boston Globe* (March 6, 1970) summarizes the play as follows:

> Now the perplexing problem about "Hair" is the apparent way it has been misunderstood by some in our midst. It has been cat-called as foul, crude, obscene, degenerate, lewd, sacrilegious, despicable and anti-American. In its savagely smiling attack on everything (except love and kindness and sharing), it has appalled some persons who confuse "Hair's" deliberately rude manner with its brotherly message. What the musical intends, and what it brilliantly achieves, is an onslaught to shake us into an awareness of the real obscenities around us. The real obscenities are war, confinement of the mind, prejudice, imprisonment of the spirit, pollution, slaughter and social injustice. And, in its own beguiling innocence, "Hair" suggests that some of the world's obscenities can be eliminated if we "let the sunshine in," if we learn but to love one another. ...
>
> Some scenes are completely sung, others are spoken in ordinary raffish street dialogue, and from the overall pattern emerges a kind of capsule history of the hippies, the alienated young struggling against the Establishment, and protesting all the way.
>
> The non-book plot is far less important than the philosophy at its core. Briefly, it centers on Claude Hopper Bukowski, who is about to be drafted, and his best friend George Berger, who has been thrown out of high school. Together, in the company of their long-haired, open-minded, free-soul friends they wander the streets in a wilful odyssey of love. They've been tricked by false values and empty goals, yet they have a belief in the perfectability of the future. They have fierce and funny confrontations with par-

ents, police, politicians, with staid religious attitudes, with self-righteous moralizing and they reach out for something more, something less hypocritical in an age where annihilation is a megaton away.

When I say they reach out, I mean it literally. They reach across the stage to the audience, as though the yearning touch of their hands would help us all, would bridge us to a human contact we have, perhaps, forgotten. They tell us about our world and are willing to ridicule themselves, along with a number of sacred cows, in the process. They hoot at Richard Nixon, Abraham Lincoln, General Custer, Jim Brown, Timothy Leary. They express love for Mick Jagger and parody The Supremes right into the funhouse. And they lead us down the dark dreams of drugs, willing to show us other worlds, and, sure, some of their thoughts are questionable. But the spirit behind them is not. Even in their sudden sorrow, the senseless death of Claude in Vietnam, there is still an exuberant conviction, an unflagging faith in tomorrow and an indefatigable belief in improving the world.

The Galt MacDermott score, with lyrics by Ragni and Rado, is a rock classic. . . . (pp. 15-16)

HAIR has received widespread critical acclaim[1] and is one of the most popular box office attractions in the history of American theatre (App. p. 107). HAIR began its run in New York City in 1967; soon thereafter it began performing in the other major cities in the United

[1] For example, in a "second look" Clive Barnes of the New York Times (*New York Times*, February 12, 1969) concluded his review with, "If you have just one show to see on Broadway try to make it this one." Sydney Harris writing in the *Chicago Daily News* (October 23, 1969) described HAIR as "an extraordinary compelling evening."

States and the world. It has been produced in 140 American cities and in fourteen cities throughout the remainder of the world.

In the past few years, HAIR's road companies began to show in various smaller cities and towns throughout the southeastern and southwestern parts of the United States. Frequently HAIR sought access to municipal facilities because in these communities they are the only or the best available places for performance. Despite the fact that these facilities had *without exception* routinely been made available for plays, some municipal auditorium and theatre managers, supported by city officials, claimed an unfettered right to determine which plays will be permitted to show and which will not. And time and time again HAIR's content—its "anti-establishment" views—collided with the different prepossessions of these municipal officials.

At petitioner's[2] request federal district courts have issued injunctions against municipal officials on the ground that their assertion of unfettered censorial discretion is wholly inconsistent with the constitutional guarantee of free speech secured by the fourteenth amendment.[3] The few district courts which denied relief were reversed on appeal. *Southeastern Promotions, Ltd.* v. *City of West Palm Beach*, 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.*, 459 F.2d 282 (10 Cir. 1972); see also *Southeastern Promotions, Ltd.* v. *City of Mobile, Ala.*, 457 F.2d 340 (5 Cir. 1972).

[2] Petitioner is the promoter of HAIR, that is, it has a contract arrangement with the New Hair Company, the owner of the play, to produce the play.

[3] Some of the district court cases are collected in *Southeastern Promotions, Ltd.* v. *City of Mobile*, 457 F.2d 340, 341 (5 Cir. 1972).

B. *Proceedings in the District Court.*

This case began in "routine" fashion. Petitioner was refused access to the municipal theatre (the "Tivoli" Theater") and it brought an action in the appropriate district court. *Southeastern Promotions, Ltd.* v. *Conrad,* (Pet. pp. 28-55; 341 F. Supp. 465). Like their counterparts elsewhere, these respondents asserted a series of paper-thin defenses which have been uniformly unsuccessful, and which were rejected in the court below. (Pet. pp. 31-35; 341 F. Supp. at 468-71.) The heart of the defense, however, was the same claim unequivocally rejected by the Fifth and Tenth Circuits: respondents asserted, just as did the municipal officials in *Mobile, West Palm Beach* and *Oklahoma City,* that they had an essentially unfettered right to determine what plays would be exhibited and what would not. And they rejected HAIR because, in their unexplained opinion, HAIR's exhibition was neither "in the best interest of the community" nor "clean and healthful and culturally uplifting" (pp. 16-17, infra).

The district judge did not squarely focus on the standards used by respondents because *at the hearing* in the district court respondents asserted for the first time that HAIR was obscene, and accordingly, it could not be exhibited. In a most unusual response, the judge empaneled an advisory jury which heard evidence and (without seeing the play) returned a verdict of obscenity. (Pet. p. 37; 341 F. Supp. at 472.) The judge agreed with this result. *Without seeing the play,* he made findings of fact and concluded that HAIR was obscene. (Pet. pp. 38-48; 341 F. Supp. at 472-77.) In so doing, the judge recognized that HAIR had been performed in 140 cities throughout the United States and had been found by four other federal courts not to be obscene. (Pet. p. 41; 341 F. Supp. at 474.) The judge's ruling (Pet. pp. 42-47; 341 F. Supp.

at 475-76) rests entirely on his attempt to carve a play into speech and *two* levels of "conduct"—that which is "illustrative" of the speech and that which is not—and to treat the latter "conduct" as wholly beyond the protection of the free speech guarantee.

C. *The Proceedings in the Court of Appeals.*

On appeal, the Sixth Circuit, over the dissent of Judge McCree, affirmed. Judge O'Sullivan and Judge Weick each wrote opinions for the majority. Judge O'Sullivan's opinion (Pet. pp. 56-64; 486 F.2d at 894-98) simply adopts the reasoning of the district court, and then contains a holding that HAIR's speech itself is obscene (Pet. p. 62; 486 F.2d at 897). His opinion does not address a single argument raised by petitioner, nor does it contain a single citation in support of his holding. Judge Weick's concurring opinion describes HAIR—a play neither he nor Judge O'Sullivan has ever seen—as one which "involves only depraved sexual action" (Pet. p. 65; 486 F.2d at 899). Judge Weick so characterized a play which has been viewed by millions of theatregoers in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, Memphis and Nashville, not to mention citizens in virtually every major capital of the western world as well as Tokyo, Sydney, and Tel Aviv.

A petition for rehearing and suggestion of rehearing *en banc* were filed. On October 30, 1973, the suggestion for *en banc* consideration was denied, Judge Edwards and Judge McCree dissenting. (Pet. p. 69; 486 F.2d at 900.) The petition for rehearing was then denied by the original panel, Judge McCree once again dissenting. (Pet. pp. 74-76; 486 F.2d at 901.) In his dissent (Pet. pp. 74-76, 486 F.2d at 903-904), Judge Edwards argued that the panel's decision was inconsistent with the standards set down by

this Court in *Miller* v. *California*, 413 U.S. 15, and that respondents' censorship was brought about under an ordinance wholly lacking in standards and one which did not provide for judicial review. He observed that

> "Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play "Hair" is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee — and this, we repeat, without any board member or judge so holding ever having seen the play. ..."

Judge Weick wrote an opinion for himself and Judge O'Sullivan denying rehearing and now took the ground that it was an appropriate exercise of judicial "discretion" to refuse equitable relief to an "obscene" play. (Pet. p. 70; 486 F.2d at 901-903)

Summary of the Argument

Point I (pp. 13-23, *infra*) demonstrates that the courts below were in error in viewing this as an obscenity case. Respondents regularly make the municipal theatre available for plays, but they do so on the basis of plainly unconstitutional criteria.

It has long been settled that municipal officials may not deny permission for the use of public facilities unless the standards governing the exercise of discretion are related to legitimate municipal ends. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-151; *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 n.22. Here the municipal ordinance governing auditorium use contains no standards, and the articulated and applied criteria were that the municipal auditorium was available only for "clean, healthful entertainment which will make for the building of a better

citizenship." On this criteria, respondents rejected HAIR after "brief" discussions of HAIR's "nudity" and its "language." *Respondents made no effort to apply obscenity criteria*—that issue did not arise until the proceedings in the district court. And the criteria actually applied are invalid under a long line of decisions in this Court, as the Fifth and Tenth Circuits recognized on virtually identical facts in *West Palm Beach, Mobile* and *Oklahoma City, supra*, p. 5.

The lower courts thought *Shuttlesworth* inapplicable because, they said, exhibition of HAIR would violate Tennessee prohibitions against obscenity. But the auditorium ordinance is not limited to obscenity. An auditorium ordinance so restricted might be valid, but that is irrelevant here. "It matters not that the words [petitioner] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." *Gooding* v. *Wilson*, 405 U.S. 518, 520; *Lewis* v. *City of New Orleans*, 415 U.S. —, —. Respondents made no effort to determine whether HAIR was obscene when they decided to reject the play.

Moreover, Respondents' conduct is an invalid prior restraint, as *Shuttlesworth* and numerous other decisions make clear. Accordingly, whether exhibit of HAIR might be the basis of a valid criminal prosecution provides no justification for the prior restraint. Nor is Judge Weick correct in arguing that all that is involved here is the court's discretionary refusal to award petitioner declaratory and injunctive relief with respect to an "obscene" play. An unconstitutional licensing provision is void on its face, and in order to challenge such a provision plaintiff is *not* required *first* to prove that its speech is constitutionally protected.

Point II (pp. 24-26) demonstrates that respondents' conduct is invalid under *Freedman* v. *Maryland*, 380 U.S. 51, and its progeny. Here, as in *Freedman*, respondents,

local municipal officials, sought to impose a final restriction upon the exhibition of a play because of its content. *Freedman* makes clear that in such circumstances municipal officials must carry the burden of instituting judicial review. (*Id.* at 58-60.) *Heller* v. *New York*, 413 U.S. 483, 489 n.5. *Freedman* requires a judicial, not an administrative, valuation of free speech claims, and it is not inapplicable, as respondents contend, simply because HAIR might be shown in some private theatres, even on the implausible assumption that private theatres were likely to accept what municipal officials had previously rejected as violative of several state statutes.

Point III (pp. 27-43) demonstrates that the courts below applied patently incorrect standards to evaluate HAIR's obscenity *vel non*. The district judge sought to carve a play into its component speech and conduct, *and* then *further* divide conduct into two levels: conduct which is "illustrative" of the speech and conduct which is not, the latter being wholly beyond the first amendment. While no criteria for distinguishing between the two levels of conduct are set forth, the first category is apparently viewed as a very narrow one. Not only is this complex analysis wholly unworkable in the context of live theatre, it rests upon a fundamental misconception of what *both* the first amendment *and* live theatre are about.

For first amendment purposes each medium must be treated for what it is; each medium must be considered in terms of its own unique problems, not artificially analyzed as though it were something else. *Kingsley International Pictures* v. *Regents*, 360 U.S. 684, 689-90; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94. In failing to recognize that fact, the courts below committed a basic error. They relied upon an oversimplified and universally criticized distinction between speech and conduct, one which finds no support in

the decisions of this Court. Every form of speech involves some related conduct. The accompanying conduct is within the protection of free speech, and it can be curtailed only if standard first amendment requirements are satisfied; namely, narrowly drawn restrictions designed to vindicate compelling governmental interests. Where the governmental interests are related to sex, obscenity requirements must be satisfied. *Miller* v. *California*, 413 U.S. 15, 27.

In attempting to atomize live theatre into its "elements," the judge plainly misunderstood the nature of live theatre, a form of communication which antedates the first amendment by thousands of years. A play is an inseparable union of words and actions which together serve as a vehicle for conveying ideas. As Judge Edenfield observed, "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Promotions, Ltd.* v. *Atlanta*, 334 F. Supp. 634, 639 (N.D. Ga. 1971). A play's "conduct", therefore, is not "separately identifiable conduct which allegedly was intended by [petitioner] to be perceived by others as expressive of particular views but which on its face, does not necessarily convey any message." *Cohen* v. *California*, 403 U.S. 15, 18.

Since each medium presents its own unique problems, it may be that, even if a play is taken as a whole, isolated scenes therein may be so lacking in communicative value and so patently offensive as to constitute hard core pornography. But it is unnecessary to focus on that issue here: first, the judge made no effort to do so, and secondly, the then existing Tennessee obscenity statutes were not narrowly drawn and directed toward that kind of conduct (*Miller* v. *California*, 413 U.S. 15, 25-26) as the state supreme court has recognized. *Art Theatre Guild, Inc.* v. *State*, ___ Tenn. ___ (1974). We would add, however, that in determining what is appropriate in the theatre one

cannot, as did the courts below, assume that the standards of the street govern what is appropriate in the theatre. The context is important, and in live theatre the audience is forewarned and the sexual orientation of the material has dramatic and communicative relevance.

Little discussion need be given to Judge O'Sullivan's unexplained "finding" that HAIR's language alone is obscene. HAIR's language may shock but that hardly makes it obscene. Obscene speech "must be, in some significant way, erotic", *Cohen* v. *California*, 403 U.S. 15, 20; *Miller* v. *California*, 413 U.S. 15, 18-19 n.2. Judge O'Sullivan plainly confuses the problem of obscene speech with so-called "offensive" speech. And here there is no showing that the Tennessee statutes are directed toward offensive speech. Moreover, this speech could not be prohibited under *Cohen, supra*, and *Gooding* v. *Wilson*, 405 U.S. 518: the speech takes place not in a public place but in a theatre where it has obvious dramatic relevance. Indeed, if Judge O'Sullivan were correct, live theatre could not depict the manner and expression of a sizable subculture in this society.

Point IV (pp. 43-49) demonstrates that there is no acceptable basis in this record for the conclusion that HAIR is obscene. Respondents rightly concede that the burden of proof on obscenity rests with them. *Blount* v. *Rizzi*, 400 U.S. 410, 17-18; *Healy* v. *James*, 408 U.S. 169, 184. Unless one concludes that it is self-demonstrating from the libretto that HAIR is hard core pornography, then on respondents' evidence alone the courts below should have held for petitioner. Respondents' testimony is extraordinarily weak and there was affirmative evidence that the play violated none, let alone all, of the criteria set out in *Miller* v. *California, supra*. Accordingly, the judge should not have disregarded the record evidence in favor of the play absent a conclusion that the libretto was

patently hard core pornography. What is more, the judge committed another error in concluding that the play was obscene without even seeing it and without any indication that it was impracticable to do so.

Argument

POINT I. THERE IS A LACK OF CONSTITUTIONALLY ACCEPTABLE STANDARDS GOVERNING USE OF THE MUNICIPAL AUDITORIUM.

The courts below were fundamentally in error in viewing this as an "obscenity case." This case is no different from those decided by the Fifth and Tenth Circuits in *Mobile, West Palm Beach* and *Oklahoma City, supra*, p. 5. Here, as in those cases, access to the municipal theatre was refused under a municipal code wholly lacking in standards; and here, as in those cases, municipal officials claimed and exercised unfettered discretion over what plays would be permitted. Respondents' action is, therefore, invalid on its face.

A. *The Necessity For And Lack Of Acceptable Standards.*

This is not a case where petitioner seeks access to a public facility not ordinarily open to the public for the use sought. Respondents permit use of the public auditorium for production of plays.[4] (E.g. App. p. 29) It has long been established that municipal officials may not deny permission for the use of public facilities unless the

[4] This is not a case where the public facility is unavailable for the type of activity (exhibition of a play) here involved. Compare *Lehman* v. *City of Shaker Heights*, 417 U.S. ___. Nor, unlike *Lehman*, is there any problem of a captive audience.

standards governing the exercise of their discretion are permissible under the first and fourteenth amendments. The cases so holding (beginning with *Lovell* v. *City of Griffin*, 303 U.S. 444) are numerous, and many are collected in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 151 n.2. *Shuttlesworth* is particularly instructive here. Defendant was there convicted for engaging in a march in violation of a local permit ordinance. The ordinance authorized the denial of the permit if the local authorities concluded that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." The ordinance was held void because it amounted to a grant of "*extensive authority* to issue or refuse to issue parade permits on the basis of broad criteria *entirely unrelated to legitimate municipal regulation*" (394 U.S. at 153). This Court said:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," 'procession," or "demonstration" on the city's streets or public ways. For *in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience."* This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. *"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official*—as by requiring a permit or license which may be granted or withheld in the discretion of such official—*is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."* (394 U.S. at 150-151).[5]

See also *Cox* v. *Louisiana*, 379 U.S. 536, 557; *Grayned* v. *City of Rockford*, 408 U.S. 104, 113, n.22; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99-101; *West Palm Beach*, *supra*, 457 F.2d at 1020-1021. That *Shuttlesworth's* teachings apply to public buildings as well as to public streets is evident, as the Fifth and Tenth Circuits recognized. See, for example, *United States Servicemen's Fund* v. *Shands*, 440 F.2d 44, 46 (4 Cir. 1971) (opinion of Craven, J.); *East Meadow Community Concerts Association* v. *Board of Education*, 19 N.Y.2d 605 (1967); *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536 (1946). See *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 129.

The crucial question, therefore, is the sufficiency of the criteria used by respondents to determine which plays shall and which shall not be allowed to make use of the municipal auditorium. We submit that here, as in *Mobile*, *West Palm Beach* and *Oklahoma City*, the constitutional requirement of "narrow, objective and definite standards" is, quite plainly, not met. Respondents make no contention that Section 2-238 of the Code of the City of Chattanooga,[6]

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[5] Emphasis supplied throughout this brief unless otherwise indicated.

[6] Section 2-238 provides:

"The board of directors of the Chattanooga Memorial Auditorium shall have complete control and the entire management of the Chattanooga Memorial Auditorium, and shall make, and by a majority vote of the board shall approve, all contracts pertaining to the maintenance, upkeep, use and operation of the auditorium; provided, that any contract involving liability on the part of the city shall have the approval of the board of commissioners." No. 1735, § 3; Code 1960, § 2-72)

which controls use of the theatre, prescribes any express standards, and accordingly, the courts below rightly made no reference to it. Rather, respondents seek to justify their conduct on a different basis. Respondents' answer (App. p. 18) asserted that to permit exhibition of HAIR

> "would be contrary to [respondents'] standing policy of leasing the premises only for clean, healthful entertainment which will make for the building of a better citizenship."

And respondents' testified to the same effect. The commissioner of utilities, grounds and buildings testified that HAIR was denied access because, "in the best interest of the community," respondents permitted only productions which are "clean and healthful and culturally uplifting."[7] Moreover, respondents' counsel repeatedly stressed

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While apparently not formally introduced as evidence, both parties and the court assumed that this provision had been so introduced and was properly before the court. App. pp. 24-25, and see Tr. Vol. 2, p. 172 where respondent's counsel said: "Your Honor, I believe [this provision has] . . . been stipulated . . ." The relevance of the provision was briefed and argued before the court of appeals on the original hearing and the petition for rehearing.

[7] The testimony (App. p. 25) in material part is as follows:

"Q. Now can you tell us, Commissioner Conrad, does the auditorium board have a policy on what productions are allowed to be presented at the Tivoli Theatre and the Auditorium?

A. There has been, as I understand it, an unwritten policy of longstanding that was taken from the original Auditorium board dedication back in 1924. Basically, since I have been associated with the board, the past four and a half years, this is the first instance where we have denied the use of this particular facility to anyone. We use the general terminology in turning down the request for its use that we felt it was not in the best interest of the community and I can't speak beyond that. That was the board's determination.

Now, I would have to speak for myself, the policy to which I would refer, as I mentioned, basically indicates that we will, as a board, allow those productions which are clean and healthful and culturally uplifting, or words to that effect. They are quoted in the original dedication booklet of the Memorial Auditorium.

Q. Did you bring that dedication booklet with you?

A. Yes, I have it here.

Q. Would you make it an exhibit to your testimony, please?"

their unfettered rights of censorship stemming, he believed, from the "proprietary" character of their activity (App. pp. 110-116).[8]

The record, therefore, demonstrates the following: in refusing petitioner's application, respondents (a) did not see the play, (b) made no effort to apply obscenity criteria, (c) never in fact considered whether HAIR was obscene; (d) discussed "briefly" HAIR's "nudity" and "language";[9] and (e) concluded that exhibition would not be in the "best interest of the public." A brief, intuitively reached decision — and HAIR was barred from access to the municipal theatre.

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[8] Passing *arguendo* the accuracy of the characterization, the distinction, whatever its relevance to the municipal tort liability under state law, has no constitutional significance. The judge, therefore, rightly rejected the argument (Pet. pp. 32-33; 341 F. Supp. at 469-70). Whenever a public body engages in activity which affects private rights it is subject to the constitution of the United States. E.g., *Smith* v. *Gougen*, ___ U.S. ___, ___. (Rehnquist, J., dissenting); *City of West Palm Beach*, *supra*, 457 F.2d at 1019-1020. See also *Oklahoma City*, *supra*, 459 F.2d at 283. Respondents did not pursue this argument in the court of appeals.

[9] "Mr. Conrad testified:

A formal vote was then taken not—to deny the booking. I believe the words used—the nudity was discussed briefly. *It was not an in-depth discussion if I recall. The nudity was discussed briefly. The language was discussed briefly. It was determined that the booking would not be made in the best interest of the public.*

Q. As a matter of fact, your obscenity defense was filed Friday the day before you went?

I had no knowledge of what the defense was. I mean, I hadn't conferred with the attorneys, I didn't know." (App. p. 56)

Assuming that respondents' "standards" formed a part of the ordinance under which they acted,[10] we know of no decision which would remotely sanction such open-ended criteria. It has no more precision than "family entertainment," which the Fifth Circuit found wanting. *City of West Palm Beach, supra.* "Clean and healthful and culturally uplifting" entertainment is the equivalent of "the public welfare, peace, safety, health, decency, good order, morals or convenience," a standard invalidated in *Shuttlesworth.* It is also the equivalent of "prejudicial to the best interests of the people of said City," a standard invalidated in *Gelling* v. *Texas,* 343 U.S. 960, and "moral, educational or amusing and harmless" which was condemned in *Superior Films, Inc.* v. *Department of Education,* 346 U.S. 587. For additional illustrations see *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 682-83. See also *Coates* v. *City of Cincinnati,* 402 U.S. 611, 614. We emphasize here that under the constitution of the United States

> "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'deceny,' or 'morals' of the community."

Shuttlesworth v. *City of Birmingham,* 394 U.S. 147, 153; see also, *Cox* v. *Louisiana,* 379 U.S. 536, 557. Accordingly, "in numerous . . . cases, [this Court has] condemned

[10] Under *Shuttlesworth* and *Niemotko* v. *Maryland,* 340 U.S. 268, we think it doubtful that, where free speech interests are at stake, respondents can supply otherwise absent standards *ex post facto* to an ordinance wholly lacking in standards. Here, as in *Shuttlesworth,* respondents *in fact* operated in a free-wheeling manner in accordance with the apparently open-ended discretion conferred upon them. Accordingly, their conduct was unconstitutional. (394 U.S. at 154-159.)

broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences." *Grayned* v. *City of Rockford,* 408 U.S. 104, 113, n.22.

B. *The Lack Of Standards Is Fatal Here.*

We think that the foregoing cases are decisive here. Respondents acted on the basis of criteria wholly unrelated to any legitimate municipal need, and which quite plainly allow for the suppression of expression because the content of what is being said differs from their own prepossessions. The district judge, however, apparently thought that these decisions were inapplicable because exhibition of HAIR would, he said, violate the Tennessee statutes and municipal ordinances relating to indecent exposure, lewdness, public nudity and obscenity. (Pet. pp. 35, 46, 48; 341 F.Supp. at 471, 76, 77.) We shall consider the merits of these matters in point III, *infra.* Here it is simply appropriate to observe two things.

First. There is nothing in the auditorium code or respondents "long standing" gloss thereon which in any way purports to restrict respondents' discretion to the question of obscenity. Perhaps a code so restricted would be valid, but that fact is irrelevant here. For it "matters not that the words [petitioner] used might have been constitutionally prohibited under a narrowly and precisely drawn statute." E.g., *Gooding* v. *Wilson,* 405 U.S. 518, 520; *Lewis* v. *New Orleans,* 415 U.S. —, —; *Parker* v. *Levy,* 417 U.S. —, —. Here the auditorium code contained no explicit standards, and the articulated *and applied* "standards" were public interest and "clean and heathful and culturally uplifting," *not*

obscenity.[11] Quite plainly, such an open-ended grant of authority constitutes, in the language of *Shuttlesworth*, " 'an unconstitutional prior censorship or *prior restraint* upon the enjoyment of [first amendment] freedoms' " (394 U.S. at 151. See also *City of West Palm Beach, supra,* 457 F.2d at 1021). Accordingly, even if these standards are treated as part of the auditorium code, the municipal code is void *on its face.* That petitioner has standing to make this challenge here, has of course, been settled since *Thornhill* v. *Alabama,* 310 U.S. 88, 96-98; see also *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613; *Parker* v. *Levy,* 417 U.S. —, —.

Second. The judge seems to have assumed that if the exhibition might violate *any* criminal statute then prior exhibition can be prohibited. The holding, of course, wholly disregards *Shuttlesworth* and its progeny because it completely ignores the distinction emphasized in *Shuttlesworth* between prior restraint and subsequent punishment. It may very well be that exhibition of a movie or play would give rise to a criminal prosecution under an obscenity statute. It does not follow, however, that *absent narrowly drawn standards* municipal licensing officials can impose restraint *prior* to exhibition. This settled distinction between prior restraint and subsequent punishment lies at the heart of the cases recognizing that an ordinance invalid on its face may be disregarded (see *Shuttlesworth, supra,* 394 U.S. at 151), and it was reaffirmed by this Court

[11] Following the grant of the petition in this case the supreme court of Tennessee invalidated its general obscenity statutes for failure to satisfy the specificity requirements of *Miller* v. *California,* 413 U.S. 15. See *Art Theatre Guild, Inc.* v. *State,* ___ Tenn. ___ (1974), discussed pp. 36-37, *infra.* In response thereto, the Tennessee legislature enacted a new obscenity statute. Chapter 510 of the Public Acts of 1974. Section 6 of that act declares void contracts involving obscene productions. That statute is of no assistance to respondents in this case, of course, *for respondents made no effort to restrict their discretion to obscenity criteria.*

in *United States* v. *New York Times, Inc.,* 403 U.S. 713, where the Court held that an injunction against newspaper publication of the so-called Pentagon Papers was an invalid prior restraint while, at the same time, a majority of the justices apparently recognized that the very conduct might have served as a basis for a subsequent criminal prosecution. Closer still to the mark is *Healy* v. *James,* 408 U.S. 169, 184, where the Court held that fear that a local S.D.S. chapter might violate college rules in the future did not warrant denial of S.D.S. recognition as a campus organization. Lack of recognition meant that S.D.S. was barred from access to college facilities, which, said the Court, was an invalid "form of prior restraint." Accordingly, as the Fifth Circuit expressly recognized in *City of West Palm Beach,*[12] whether or not HAIR could be the subject of a criminal prosecution has no bearing on the validity of defendants' prior restraint on this exhibition. See also *Gooding* v. *Wilson, supra*; *Lewis* v. *New Orleans, supra.* The municipal code under which respondents were acting is invalid on its face. On this ground alone, the judge should have declared that the refusal to issue the permit was unlawful without addressing himself to any other question.

In his concurring opinion denying the petition for rehearing, Judge Weick attempts to reformulate the grounds of the district court by arguing that all that is involved here is the court's discretionary refusal to award petitioners declaratory and injunctive relief with respect to an "obscene" play. (Pet. pp. 71-73; 486 F.2d at 901-02).

[12] "Moreover, we hasten to add that the factual situation in the instant case is much more offensive in a constitutional sense than the circumstances in *Shuttlesworth.* There the petitioner was punished under the terms of an unconstitutional ordinance *after* exercising his right of free speech. In the instant case, the discretion of the defendant Boyer operated as a prior restraint upon the plaintiff's freedom of speech." (457 F.2d at 1021) (Emphasis in original).

We put to one side the confusion in this analysis.[13] Laid bare, Judge Weick's argument is that respondents' unconstitutional conduct can be salvaged by a *subsequent* judicial determination that the particular speech involved is unprotected. That argument is not supported by a single decision of this Court and is wholly at variance with sound first amendment considerations. At least since *Near* v. *Minnesota*, 283 U.S. 697, it has been clear that petitioner need not prove the protected character of its speech as a condition precedent to invoking the rules laid down by this Court governing prior restraint and lack of acceptable standards. We invite the Court's attention to the line of cases beginning with *Lovell* v. *Griffin*, *supra*, p. 13, and collected in *Shuttlesworth*, 394 U.S. at 151 n.2. In not one of those cases was it suggested that a petitioner must prove the protected character of its speech as a condition precedent to objecting to facially invalid licensing provisions. See also the line of cases stemming from *Cohen* v. *California*, 403 U.S. 15, and *Gooding* v. *Wilson*, 405 U.S. 518, permitting facial attacks on state statutes without consideration of the protected character of the particular speech involved. E.g., *Plummer* v. *City of Columbus*, 414 U.S. 2; *Lewis* v. *City of New Orleans*, 415 U.S. —; *Parker* v. *Levy*, 417 U.S. —, —.

[13] The question is one of remedial discretion, according to Judge Weick. Where are the informing principles to be drawn from? Is Judge Weick suggesting that, because HAIR is obscene under *state* law, no federal prospective relief should be given? If so, what is the result when, as here, (pp. 36-37, *infra*), the state supreme court holds its own obscenity laws void? And what, in the context of the assertion of federal substantive rights, is the relevance of state law on the discretionary aspects of federal equitable remedies? Hart & Wechsler, *The Federal Courts and the Federal System*, (2 ed.) 787-800, with which compare *id.*, at 719-34 on federal equitable remedies in the context of state substantive law. Or is Judge Weick saying that no federal prospective relief should be given when the speech is, as a matter of federal law, unprotected?

Objections relating to the facial invalidity of state statutes may, of course, be raised in suits for prospective relief. E.g., *United States* v. *Raines*, 362 U.S. 17, 22-23; *Zwickler* v. *Koota*, 389 U.S. 241, 245; *Law Students Research Council* v. *Wadmond*, 401 U.S. 154; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-613; *Steffel* v. *Thompson*, 415 U.S. —; *Procunier* v. *Martinez*, 416 U.S. —.[14] The availability of prospective relief in free speech cases is a recognition that "where First Amendment rights are involved — questions relating to the structure and timing of [judicial] remedies have been thought crucial to substantive constitutional policies." Hart & Wechsler, *The Federal Court and the Federal System*, (2 ed.) 367, a point elsewhere discussed at length by one of counsel. Monaghan, *First Amendment, "Due Process"*, 83 Harv. L. Rev. 518, 524-26.

Judge Weick's appeal to the district court's "discretion" is, therefore, question begging. Judicial "discretion" must be exercised with an eye toward free speech values, and that was not done here. Judge Weick's view would rob the prior restraint cases of any meaning: there would be no need to consider any subsequent issue if it were initially determined that petitioner's speech was not obscene and, therefore, constitutionally protected. Moreover, Judge Weick's view would encourage illegal conduct by municipal officials by holding out the hope that a judge might subsequently determine that the speech was unprotected.

Respondents' conduct should have been held to be invalid because it was based upon a lack of acceptable standards and constituted an invalid prior restraint.

[14] The same rule applies where other fundamental rights are at stake. E.g., *Kusper* v. *Pontikes*, 414 U.S. 51; *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441.

POINT II. RESPONDENTS' CONDUCT IS INVALID BECAUSE THEY WERE UNDER NO OBLIGATION TO INSTITUTE JUDICIAL REVIEW.

Both courts below failed to recognize that respondents' refusal to permit HAIR access to the municipal auditorium was facially invalid not only for lack of acceptable standards but because it was in flat conflict with *Freedman* v. *Maryland*, 380 U.S. 51. That case involved the constitutionality of a Maryland motion picture censorship statute which required an exhibitor to submit the film to a municipal licensing board prior to its showing. If the board disapproved the film, the burden of instituting judicial review lay with the exhibitor. The statute placed no time limits on either the administrative or the judicial determinations. Accepting the argument that under the statute "judicial review may be too little and too late" (*id.* at 57), a unanimous court invalidated the statute in an opinion by Mr. Justice Brennan. While unwilling to hold that a motion picture exhibitor had an absolute right to exhibit without a prior determination of obscenity, the Court ringed any such procedure with tight safeguards. The Court said:

> [t]he teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. (380 U.S. at 58)

And of critical importance here is the Court's holding that the burden of seeking judicial review is on the city officials and that the statute was void for failure to so provide. (380 U.S. at 58-60) See also *Teitel Films* v. *Cusack*, 390 U.S. 139; *Blount* v. *Rizzi*, 400 U.S. 410, 417: In *Freedman*, "We held that to avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor. . . ." *Heller* v. *New York*, 413 U.S. 483, 489 n.5.

Freedman is not inapplicable, as respondents contend, because HAIR's materials have not been confiscated [15] or because the play might [16] be shown in private theatres. *First.* The asserted distinction wholly ignores the obvious "in terrorem" effect of such a municipal decision on private theatre owners in small communities. They are hardly likely to accept for exhibition what municipal officials have previously rejected because exhibition would be violative of several state statutes! Cf. *Bantam Books* v. *Sullivan*, 372 U.S. 58. *Second. Freedman* recognizes that, at least as a preliminary matter, municipal officials may in the ordinary course of their duties be called upon to consider questions which have a direct impact on freedom of speech. But, under the fourteenth amendment, municipal officials cannot assume the role of arbiters of what the public should or should not hear on the basis of impermissible criteria relating to the *content* of speech. Given the informal nature and low visibility of these municipal decisions, there are substantial dangers that censorship of this nature will occur. *Freedman* recognizes this danger, and it requires that there be a judicial, not

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[15] Apparently respondents rely upon language in *Heller* v. *New York*, 413 U.S. 483, 490, where the Court observed that initial seizure under a warrant of *one* copy of a film which was detained as evidence did not violate *Freedman*. But we are dealing here with a *final* administrative (not a judicial) determination that the play could not be shown.

[16] Petitioner here alleged (App. p. 12) that there was no other adequate facility to product HAIR — a fact often true in any smaller community. Respondents' answer, it should be noted, does *not* clearly deny that allegation. (App. p. 20, par. 10) There is no judicial finding on that issue.

an administrative, valuation of first amendment claims before a final restraint can be imposed.

As one of petitioner's counsel here has elsewhere observed: "*Freedman's* preference for judicial evaluation of first amendment claims rests upon the most fundamental considerations—the inherent institutional differences between courts and administrative agencies, no matter how judicial the administrative proceedings may be." Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 522-23. Here the municipal licensing officials made a *final* decision on grounds of a play's content; whether the result is a final bar to exhibition in *all* available places in the municipality or only in *some* (municipal buildings) is irrelevant to *Freedman's* policies. In *Blount* v. *Rizzi*, 400 U.S. 410, a unanimous Court applied *Freedman* to hold invalid the administrative censorship scheme created by 39 U.S.C. §§ 4006-07. Those statutes authorized the postmaster general to halt use of the mails for commerce in allegedly obscene material. No suggestion was made that *Freedman* was inapplicable because other modes of transportation were available to petitioner, see *id.* at 416-417; similarly irrelevant is the fact, if it be one, that other places of exhibition might be available to petitioner. Not surprisingly, therefore, the Seventh Circuit has expressly rejected respondents' contention, *Collin* v. *Chicago Park District*, 460 F.2d 746, 756-57, as have other courts implicitly. E.g. *Women Strike for Peace* v. *Morton*, 472 F.2d 1273 (D.C. Cir.).[17]

[17] Respondents faintly asserted in the court of appeals that petitioner did not raise the *Freedman* issue in the district court. There is no record of the various arguments orally made in the district court, and much time was, in fact, spent in obtaining an expedited hearing from the court and on meeting the judge's strong concern with the obscenity issue. But other issues were also raised and considered, and on this record there is no showing that it was *not* raised. The complaint specifically asserts that respondents' conduct was an unconstitutional prior restraint (Complaint, pars. 3, 4; App. pp. 7-8) and, absent compliance with *Freedman* that is plainly so. Moreover, defendants' conduct is under an ordinance which in failing to provide for judicial review is void on its face under *Freedman* and defendants have standing to raise that issue, *Broadrick* v. *Oklahoma*, *supra*. *Freedman* was briefed and argued in the court of appeals and not surprisingly, Judges Edwards and McCree expressly pointed to its violation. (Pet. p. 75; 486 F.2d at 903-904.) While *Freedman* was squarely raised in the petition for certiorari (p. 2), respondents' brief in opposition wholly ignored the point. Finally, the defect of the auditorium code under *Freedman* is so palpable that it could be noticed here for the first time, see *Vachon* v. *New Hampshire*, 414 U.S. 478, 479, and see the cases collected in the dissenting opinion in *Mayor of the City of Philadelphia* v. *Educational Equality League*, ___ U.S. ___. Thus, it is unnecessary to consider whether the issue is also properly here under *Hormel* v. *Helvering*, 312 U.S. 552, 556-57, and *Anderson* v. *United States*, 416 U.S. ___, ___ n.5 and n.12.

POINT III. THE COURTS BELOW APPLIED AN INCORRECT STANDARD TO EVALUATE THE PLAY.

While the judge quoted and made reference to other Tennessee criminal statutes bearing on sexual conduct such as public nudity and lewdness (Pet. p. 36; 341 F. Supp. at 471), the judge and the court of appeals focused *entirely* on the question of obscenity. Thus it is unnecessary to consider whether any standard other than obscenity would suffice. But, while perhaps unnecessary to the resolution of this suit, we think it plain that, whatever the characterization of the offense under state law, obscenity requirements must be satisfied whenever the state seeks to proscribe speech because of its sexual orientation. That is surely central to the reasoning in both *California* v. *LaRue*, 409 U.S. 109 and *City of Kenosha* v. *Bruno*, 412 U.S. 507, 515, to say nothing of *Miller* v. *California*, 413 U.S. 15, *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 and the other 1973 obscenity cases, including the remands based upon those decisions. "Under the holdings announced today, no one will be subject to prosecution for the

sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." *Miller* v. *California, supra,* at 27.[18] That obscenity criteria must be satisfied in state regulation of motion pictures is the implicit premise of countless decisions of this Court. See the cases cited and *Kaplan* v. *California,* 413 U.S. 115; *Jenkins* v. *Georgia,* 417 U.S. ___. Surely *no principled distinction can be advanced* for holding that, however modified to take into account differences among the various media, obscenity criteria must be satisfied in dealing with sexual representations in motion pictures, but they are *wholly inapplicable* with respect to live theatre performances of the same material. Speaking specifically of live theatre, the California Supreme Court, in recognizing that obscenity criteria must be satisfied, emphasized that "any more restrictive rule could annihilate in a strike much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." *Barrows* v. *Municipal Court,* 1 Cal. 3d 821, 831.[19]

[18] This language was quoted with approval in both *Hamling* v. *United States*, 417 U.S. ___, ___, and *Jenkins* v. *Georgia*, 417 U.S. ___, ___.

[19] The lower courts are unanimous in holding that obscenity requirements — *however refined to take account of the differences in the various media* — must be satisfied with respect to live theatre. In *P.B.I.C., Inc.* v. *Byrne*, 313 F. Supp. 757, 763-764 (D. Mass. 1970), remanded on other grounds 413 U.S. 905, a three-judge district court, in opinion by Circuit Judge Coffin, expressly so held. The court there enjoined threatened criminal prosecution of HAIR under state "lewdness" statutes which, as construed, did not require satisfaction of the obscenity requirements laid down by this Court. This decision was in accord with that of every court which has considered the problem. *Barrows* v. *Municipal Court*, supra; *People* v. *City of Newark*, 22 N.J. 472 (1954), *aff'd* 354 U.S. 931. *People* v. *Bercowitz*, 308 N.YS.2d 1 (1970).

A. *The District Court's Opinion.*

As the courts below saw the matter, the heart of the case turned on whether HAIR was obscene. The district judge empaneled an advisory jury and held an evidentiary hearing. The jury returned a verdict of obscenity (Pet. p. 37; 341 F. Supp. at 472). Not only did the jury not see the play, the question of obscenity was submitted to it in an indiscriminate manner.[20] That neither the district judge nor the court of appeals could attach controlling significance to the jury's verdict, is, of course, clear beyond doubt. A judge must make his own *independent determination* whether the speech is protected by the constitution of the United States.[21] E.g., *Miller* v. *California,* 413 U.S. 15, 28-29; *Kois* v. *Wisconsin,* 408 U.S. 229, 231-232.[22] The judge recognized this fact; after reciting the findings of the jury he proceeded to make extensive findings of his own (Pet. pp. 38-42; 341 F. Supp. at 472-74).

In finding HAIR obscene the district judge recognized that he was reaching a result contrary to every other court which has considered the matter about a play which has shown in over 140 cities (Pet. p. 41; 341 F. Supp. at 474), and which is one of the most successful and widely acclaimed theatre productions in modern times.

[20] While it is unnecessary to consider the point here, the role of the jury in free speech cases raises substantial questions. Monaghan, *First Amendment "Due Process"*, *supra*, 83 Harv. L. Rev. at 528-29.

[21] This is part of the larger principle that where free speech claims are at stake the court must make its own independent determination. *New York Times* v. *Sullivan*, 376 U.S. 254, 284-85; *Letter Carriers* v. *Austin*, 417 U.S. ___, ___.

[22] Perhaps greater leeway exists where the question on appellate review is whether the material appeals to a prurient interest or is patently offensive, rather than whether the material has serious literary or political value. See Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 82 Yale L.J. 127, 153 n.118 and related text. Cf. *Hamling* v. *United States*, 417 U.S. ___. But even on the former issues the Court retains the ultimate power to make an independent determination of its own. *Jenkins* v. *Georgia*, 417 U.S. ___.

The judge recognized, as he must, that HAIR's brief nude scene was not decisive, for "nudity alone is not enough to make material legally obscene." *Jenkins* v. *Georgia*, 417 U.S. —, —. See also *City of Kenosha* v. *Bruno*, 412 U.S. 507, 515; *California* v. *LaRue*, 409 U.S. 109; *Kois* v. *Wisconsin*, 408 U.S. 229;[23] particularly where, as here, the nude scene is plainly not designed to appeal to "a shameful or morbid interest in nudity, sex, etc." *Roth* v. *United States*, 354 U.S. 476, 487 n. 20. Its setting is symbolic, not erotic. (App. pp. 97-98). *Cohen* v. *California*, 403 U.S. 15, 20.

The judge reached the conclusion he did because he fundamentally misunderstood the controlling constitutional standards. The crucial part of the judge's ruling, approved by the court of appeals, follows:

> "Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. *It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment.* These matters were dealt with by the United States Supreme Court in the case of *United States* v. *O'Brien*, 391 U.S. 367 . . . .
>
> *"It is further clear to this Court that conduct not within the First Amendment is not subject to the*

[23] This is not a case of nudity occurring in public places as was *Nelson* v. *Iowa*, 178 N.W.2d 434, *cert. den.* 401 U.S. 923. Here the nudity occurs in a theatre, the audience is forewarned, and the nudity had dramatic relevance to the performance. *See P.B.I.C., Inc.* v. *Byrne*, *supra*, 313 F. Supp. at 764. See Harlan, J., *Manual Enterprises* v. *Day*, 370 U.S. 478, 490; *Jacobellis* v. *Ohio*, 378 U.S. 184; *Cain* v. *Kentucky*, 397 U.S. 319; *Bloss* v. *Dykeman*, 398 U.S. 278. Moreover, there is no showing that the Tennessee statutes were specifically directed at nudity.

> *requirement that the production in which it takes place be judged as a whole*, but rather that the conduct may be judged obscene or nonobscene on the basis of individual acts of conduct. It is abundantly clear that if a crime other than the crime of obscenity were committed upon the stage, the actor committing that crime could neither claim First Amendment protection nor could he require that he be judged criminal or noncriminal on the basis of the production as a whole . . . . *Accordingly, it must be that when the crime of obscenity is committed upon the live stage by conduct and not by speech*, or symbolic speech, no First Amendment protection attaches to that conduct *and no First Amendment requirement attaches that requires the production as a whole to be reviewed in determining such criminal obscenity.*
>
> "This Court is aware that a district judge dealt differently with this issue in the case of *Southeastern Promotions, Ltd.* v. *City of Atlanta*, D.C., 334 F.Supp. 634 (1971) cited above. The Court there held that a stage production cannot be dissected into speech and nonspeech components . . . . It is a false and dangerous doctrine that the First Amendment forbids all regulation of conduct so long as that conduct masquerades under the guise of the treatrical. This Court respectfully declines to follow the rule set forth by the district judge in the *Atlanta* case. The same fallacy attaches to each of the cases relied upon by the plaintiff in prior adjudications of the theatrical production "Hair."
>
> "When viewed in their component parts, it is perfectly clear that the actors and actresses in the theatrical production "Hair," by their conduct, and apart from any element of speech, commit repeated acts of criminal obscenity . . . . The Municipal Auditorium is

a public place and the committing of live acts of simulated sexual intercourse, masturbation and mixed group nudity upon the stage before a live audience appeals to the prurient interest in sex, is patently offensive because it affronts contemporary community standards, both state and national, relating to the representation of sexual matters, and it is utterly without redeeming social value." (Pet. pp. 43-46; 341 F. Supp. at 475-76) (Emphasis supplied.)

The judge's distinction might, on the surface, seem to be a simple one — aimed solely at hard core pornography wrapped up in dialogue and presented as a play. Cf. *Miller* v. *California*, 413 U.S. 15, 25 n. 7. But, quite plainly, the judge meant something of a quite different order, as is apparent from his conclusion that one of the most important plays in modern times is obscene. Indeed, it seems evident that the district court's approach would eliminate from live theatre virtually every sexually oriented scene no matter how presented and how central to the plot. By the criteria used below many of the Greek classics (e.g., Lysistrata) could not be shown. See G. Norwood, *Greek Comedy*, 1-13 (1963).

B. *Live Theatre Is A Unitary Production, Artistically and Constitutionally.*

The courts below would artificially separate any play — a unitary presentation — into its constitutent words and conduct; they would then further divide "conduct" into that which is "illustrative" of the speech and that which is not — the latter then being treated as wholly beyond the first amendment. No criteria are suggested for discriminating between the two types of "conduct", but it seems apparent that what constitutes "illustrative" conduct is a very narrow species, indeed. We submit that

this judicial atomization of a unitary mode of expression discloses a total misapprehension of what both the constitutional guarantee of free speech *and* live theatre are all about.

Fundamentally, both courts below ignored the crucial point that each medium presents its own unique problems under the first and fourteenth amendments. E.g., *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684, 689-90; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94. As Mr. Justice Jackson aptly observed, "each [medium] is a law unto itself." *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (concurring opinion). Accordingly, each medium must be taken for what it is, not treated as though it were something else. The district judge wholly ignored these considerations. Instead, he relied upon an over-simplified distinction between "speech" and "conduct," an oversimplification which has been criticized by every commentator who has considered the subject.[24] It is, moreover, an oversimplification that finds no warrant in the decisions of this Court. Those decisions, of which *Spence* v. *Washington*, 417 U.S. —, is only a recent example, recognize that every aspect of speech involves some integrally related conduct, which has necessarily been treated as a part of that speech.[25] See also *Saxbe* v. *Washington Post Co.*, 417 U.S. —, — (Powell, J.,

[24] E.g., Kalven, *The Concept of the Public Forum; Cox* v. *Louisiana*, 1965 S. Ct. Rev. 1, 23-24; Henkin, *On Drawing Lines*, 82 Harv. L. Rev. 63, 80: "If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is speech." See also Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 6; Comment, *Symbolic Conduct*, 68 Col. L. Rev. 1091.

[25] Thus the *conduct* of wearing arm bands is protected, *Tinker* v. *Des Moines School District*, 393 U.S. 503. So too is the *conduct* of distributing leaflets protected by the first amendment. *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415, 419. Similarly, picketing and demonstrations, while they involve speech "plus" conduct are entitled to considerable protection under the first amend-

dissenting). These decisions make plain that first amendment freedoms are not to be denied by artificially breaking up essentially unitary forms of communication into "speech" and "something else". "Speech" in the constitutional sense includes a range of integrally related activities, such as leafleting, operating broadcasting facilities, associating for speech purposes, demonstrating, picketing, etc. These activities are *within* the ambit of free speech, and can be curtailed only if standard first amendment requirements are satisfied; namely, a narrowly drawn restriction designed to vindicate compelling governmental interests. That is the plain relevance of the foregoing cases, of *United States* v. *O'Brien*, on which the district judge relied, and of the obscenity decisions of this Court during the last two terms.

The judge, as we have said, also showed no understanding of the nature of live theatre. In live theatre — a form

ment. *Amalgamated Food Employees Union* v. *Logan Plaza*, 391 U.S. 308; *Gregory* v. *Chicago*, 394 U.S. 111; and *Brown* v. *Louisiana*, 383 U.S. 131; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99. In essence this is because it has always been understood that some conduct is an integral part of the speech itself, and the communication cannot exist without both. The unworkability of any simple distinction between speech and conduct was recognized in numerous opinions of this Court during recent terms. Thus in *Grayned* v. *Rockford*, 408 U.S. 104, and *Police Department of Chicago*, v. *Mosley*, 408 U.S. 92, the Court again recognized that picketing is within the protection of the first amendment, and both opinions referred to picketing as "expressive conduct". In *Kleindienst* v. *Mandel*, 408 U.S. 753, 764, the Court specifically rejected an attempt to resolve a first amendment issue in terms of an "action-speech" dichotomy saying "we cannot realistically say that the problem facing us disappears entirely or is non-existent because the mode of regulation bears directly on physical movement." In *Healy* v. *James*, 408 U.S. 169, 181, the Court once more observed that "speech" includes more than "speaking", again recognizing that the right embraces freedom of association even though "the freedom of association is not explicitly set out . . . ." See also *Procunier* v. *Martinez*, ___ U.S. ___. We would also invite the Court's attention to *Wisconsin* v. *Yoder*, 406 U.S. 205, the Amish School case, where the Court refused to analyze a freedom of religion claim in terms of a facile distinction between beliefs and "conduct."

of communication which antedates the first amendment by thousands of years — there is an inseparable union of words and action, which *together* serve as a vehicle for conveying ideas. That live theatre involves an inseperable union of words and action was clearly understood 2,300 years ago by Aristotle in his influential *Poetics*, see Book 1, Ch. 6, and a contrary view would certainly startle those involved with that art form. E.g., Shank, *The Art of Dramatic Art* (Delta 1969), particularly ch. 4; *The Theory of the Modern Stage*, E. Bentley, ed., (Pelican 1968). This union has never been understood to be "mainly conduct and little speech." *Cohen* v. *California*, 403 U.S. 15, 27 (dissenting opinion). To the contrary, it has always had "a recognizable communicative aspect [which is] beyond dispute." *Cowgill* v. *California*, 396 U.S. 371 (memorandum of Harlan, J.). And, as Judge Edenfield observed, "The nonverbal elements in a theatrical production are the very ones which distinguish this form of art from literature." *Southeastern Promotions, Ltd. v. Atlanta*, 324 F. Supp. 634, 639. A play's "conduct", therefore, is not "separately identifiable conduct which allegedly was intended by [petitioner] to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message." *Cohen* v. *California*, 403 U.S. 15, 18.[26] A play is, we submit, *the* classic form of "expressive conduct". *Grayned* v. *City of Rockland*, 408 U.S. 104, 120; *Spence* v. *Washington*, 417 U.S. —, —.

HAIR, it should be noted, represents an important illustration of contemporary theatre's efforts at restructuring the age old relationship between words and con-

[26] A play is therefore, not simply "conduct without substantial communicative intent and import". White, J., concurring in *Smith* v. *Gougen*, ___ U.S. ___. The "nature of the activity combined with the factual context and environment" (*Spence* v. *Washington*, 417 U.S. ___, ___) make that clear.

duct in live theatre.[27] But that matter need not be pursued here. The crucial point is that it is neither good theatre nor good first amendment doctrine arbtirarily to severe a unitary production into the artifical categories of speech and conduct. If motion picture theatre productions are constitutionally entitled to the protection of the obscenity standard, no sufficiently principled justification can be advanced for holding these standards *wholly inapplicable* to a live theatre performance *of the same matter.* Accordingly, the non-speech aspects of the theatre (if any) can be regulated only upon a showing of "a sufficiently important governmental interest" (*United States* v. *O'Brien,* 391 U.S. 367, 376) which, in the context of the regulation of sex, requires specifically framed prohibitions satisfying obscenity criteria. *Miller* v. *California,* 413 U.S. 15, 25-26. See *P.B.I.C., Inc.* v. *Byrne, supra; Oklahoma City, supra,* 459 F.2d at 283-84. (See also, pp. 37-39, *infra,* on the distinction, ignored by the judge, between murder and simulated sexual acts on stage.)

The courts below were, therefore, plainly wrong. And once the complex and artificial distinctions invoked by the courts below are rejected, no basis exists for assuming that the Tennessee obscenity statutes satisfy the specificity requirements of *Miller* v. *California, supra,* at 25-26. Ten

[27] As Norris Houghton observed, HAIR is prototypical of more than modern plays dealing with social protest; it is an important illustration of the artistic changes occurring in contemporary theatre. Houghton, *The Exploding Stage,* 201-205, 211, 232 (Weybright & Talley, N.Y.). So far as pertinent here, HAIR is a classic illustration of contemporary theatre's "war on words" (p. 204), one of which "presupposes nonverbal artistic expression that is contemporary, a system of movement that conveys, almost as a dance can do, the theatrical intent." (p. 206) This is not "suppressing speech . . . but of changing its role . . . (p. 205). The overall purpose of this and other artistic changes is to achieve "a new relationship with the spectator" (p. 203).

days after this petition for certiorari was granted, the supreme court of Tennessee, in fact, expressly held that the state obscenity statutes conflicted with *Miller's* specificity requirements. *Art Theatre Guild, Inc.* v. *State,* — Tenn. —, 14 Cr. L. R. 2498. Tennessee has enacted legislation to rectify the defect. Chapter 510 of the Public Acts of 1974. But that matter need not be pursued further here: the critical issue is not the specificity *vel non* of the Tennessee statutes, but whether the lower courts correctly understood the constitutional standards applicable to *any* state obscenity statute as it applies to live theatre—however "specific" the statute. Put differently, *Miller* v. *California, supra,* did two things: *Miller* modified *Roth's* definition of obscenity; it *also* required that the state statutes be specific. (413 U.S. at 24-26.) Whether the new legislation cures the latter defect is not at issue here. The point is that the lower courts simply misunderstood the relevance of *Miller,* in the context of live theatre. And no matter what Tennessee statute is passed, that will always be the case so long as the court of appeals relies upon its "speech-conduct" criteria set forth in this case. We emphasize, therefore, that a remand is not appropriate in this case: the defect complained of here is not in the Tennessee laws but in the court of appeals' understanding of the constitutional principles laid down by this Court.

C. *The Standards of the Street Are Not Applicable to the Theatre.*

Without seeing the play, the judge found the "conduct" in HAIR obscene because not "illustrative of the speech" because, he said the simulated sexual conduct was "unrelated to" (Pet. p. 40) or "without reference to (Pet. p. 41) any *dialogue.*" (341 F.Supp. at 474) That conclusion, incredible on its face and wholly without any accept-

able basis in this record, is most revealing: the judge does not find that the simulated sexual conduct is not relevant to the *play*, simply to the dialogue. It seems apparent to us that the judge assumes that the play and dialogue are one, thereby missing the whole idea of what live theatre is all about.[28]

Moreover, even if the conduct were "unrelated" to the "dialogue" why was that conduct "obscene"? The fact that there is a brief nude scene at the end of the first act is certainly not enough, as the district judge recognized, particularly since that scene was *not* erotically oriented. (App. pp. 97-98) The judge seemed rather to have focused on "simulated sexual conduct." (Pet. p. 40; 341 F. Supp. at 474) Emphasis should be placed upon *simulated*. The judge does not find that there was any actual masturbation, sodomy or oral copulation; he finds simply that it was "simulated." The judge does not find that this "conduct" has no relation to the play, or that, *in that context*, it was hard core pornography.

We think it plain that the judge found the conduct obscene because he simply assumed that the standards of the street are applicable to the theatre. So too do respondents, as is apparent from their misplaced reliance in the court of appeals upon the following language in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 67:

> "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become *automatically* protected by the Constitution merely because the conduct is moved to a bar or a *'live' theatre stage*, any more than a 'live' performance of a man and woman locked in sexual embrace

[28] His view stands in sharp contrast to *Kois* v. *Wisconsin*, 408 U.S. 229, 231, where nude pictures in a newspaper were held protected because "they are relevant to the theme of the article." See also note 27, page 36, *supra*.

> at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

But surely this language is torn wholly from context. The Court was not addressing itself to the standards to be applied to live theatre; it was simply rejecting an extreme view that "anything goes" simply because it occurs on a stage.

We recognize, of course, that states "have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller* v. *California*, 413 U.S. 15, 26 n. 8. But that observation does not end the inquiry. This Court has repeatedly recognized that a "reviewing court must, of necessity, look at the context of the material, as well as its content." *Kois* v. *Wisconsin*, 408 U.S. 229, 231. "First Amendment guarantees must be 'applied in light of the special characteristics of the . . . environment' " *Procunier* v. *Martinez*, ___ U.S. —, —. *Spence* v. *Washington*, 417 U.S. —, —. That words, pictures or action occur in the theatre as part of a serious theatrical work rather than on the street is, therefore, relevant. And

> " '[A]cts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' "

Barrows v. *Municipal Court*, 1 Cal. 3rd 821, 830. This Court's pronouncement in *California* v. *LaRue*, 409 U.S. 109, 116-118, expressly recognizes those facts in holding that conduct in a public barroom is not to be equated with "conduct" occurring in the context of a theatre performance, as Judge McCree rightly pointed out in his

dissent in the court of appeals (Pet. p. 67; 486 F.2d at 899-900). Were the result otherwise, the loss of free speech values would be considerable. As Judge Coffin wrote in *P.B.I.C., Inc.* v. *Byrne, supra,* 313 F. Supp. at 764-65: "We cannot escape the conclusion that to apply the standards of the street and market place to the world behind the footlights would be to sanction a censorship dragnet of unconstitutional proportions."

In determining whether a play is obscene the same general standards as would apply with respect to its movie counterpart must be applied. *Kaplan* v. *California,* 413 U.S. 115, 119.[29] We recognize, however, that each medium presents its own special problems which, in turn, may require somewhat different accommodations. It is, as we have said, possible that even if a written description of conduct might not be obscene, a statute *specifically* proscribing a presentation of that conduct occurring in the context of a motion picture or play might be valid: if the particular conduct is patently offensive and so lacking in relevance and communicative value that it could constitute hard core pornography. *Miller* v. *California, supra* at 25-26. Issues of that character need not be resolved here, however, since the courts below did not approach the problem in that manner.

But in this regard we would observe that in evaluating the sexual content of a play, one should not assume, *a priori,* that more stringent requirements can be imposed on live theatre than on movie depictions of the same matter. The reverse may, in fact, be nearer to the truth. As Judge Coffin observed, such "factors as pose, lighting, angle of audience vision, mobility and dramatic context" have importance. *P.B.I.C., Inc.* v. *Byrne, supra,* 313 F. Supp. at 764. The magnification of conduct and the

[29] "The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books."

resulting clarity with which it may be seen on a large screen may emphasize and distort sexual activity far more than could be done on a distant, dimly lighted stage. Accordingly, while the state concededly possesses power to punish either actual or simulated sexual conduct occurring on a public street, the distinction between the two may be of considerable constitutional moment in the context of the movies or live theatre. Simulation of life is, after all, a good deal of what those media are about. By contrast, actual, instead of simulated, murder would far transcend the speech expectations of any theatre audience — which expects that all the players will be around for the curtain call. Actual murders, actual use of narcotics, etc., simply do *not* constitute "a common comprehensible form of expression" to the theatre audience, Henkin, *supra,* page 32, note 19.[30] See *Spence* v. *Washington,* 417 U.S. —, —.

D. *The Obscenity of HAIR's Language.*

The foregoing observations dispose of Judge O'Sullivan's unexplained finding that the language of HAIR is obscene *per se* (Pet. p. 62; 486 F.2d at 897). In this respect the court of appeals, it should be noted, went considerably beyond the district court. The district judge made detailed findings concerning HAIR's "street language," but he recognized (Pet. p. 43; 341 F. Supp. at 475) that this was not decisive under the decisions of this Court. *Cohen* v. *California,* 403 U.S. 15; *Gooding* v. *Wilson,* 405 U.S. 518; *Hess* v. *Indiana,* 414 U.S. 105; and *Lewis* v. *New Orleans,* 415 U.S. —. These cases have an *a fortiori* pertinence here because the play's dialogue

[30] Moreover, even if this conduct were also characterized as "symbolic speech" "compelling state interests" would support state prohibition of the conduct mentioned. *United States* v. *O'Brien, supra.*

is, of course, not arguably within any "fighting words" exception. *Hess* v. *Indiana, supra,* at 107-08.

Judge O'Sullivan's "finding" is without any support in the record. Fundamentally, Judge O'Sullivan simply confuses obscene speech with so-called "offensive" speech. *Jacobs* v. *Board of School Commissioners,* 490 F.2d 601, 609-610 (7 Cir. 1973), *certiorari granted,* 417 U.S. —. This is, of course, plain error. "[O]bscene expression . . . must be, in some significant way, erotic." *Cohen* v. *California, supra,* at 20; *Papish* v. *Board of Curators of University of Missouri,* 410 U.S. 667, 670; *Miller* v. *California,* 413 U.S. 15, 18-19 n.2 HAIR's speech may shock, but there is no demonstration that its dominant theme is erotic. Once Judge O'Sullivan's erroneous characterization is laid bare, it is a sufficient answer to his argument to observe that there is no narrowly drawn Tennessee statute which purports to proscribe HAIR's "offensive" speech.

But we would make an additional response. With deference to those members of this Court who apparently believe otherwise, it seems to us far too late in the day to permit censorship solely designed to police the elegance of language. "Vulgar" language is the method by which many groups in our society communicate in whole or in part. Surely subcultures are entitled to communicate in the form which they find relevant. Note 53 B.U. L. Rev. 834, 853-57.[31] *Cohen* and its progeny are right in that insight.[32]

[31] Moreover, it would be an error to overlook the danger to dissident groups if censorship of offensive speech is permitted. "Offensive words are most often used in public by members of groups whose divergence from the traditional American life style includes social, political, philosophical, cultural, and linguistic differences. It is not coincidental that the litigants in *Cohen*, *Gooding*, *Rosenfeld*, *Lewis*, *Brown*, and *Papish* were all members of such groups. To allow enforcing authorities who are often the object of this offensive language to suppress it simply because partisans of the dominant life style find it distasteful is to censor the vital ideological and emotional content of dissidents' expression. The discretionary power of the police to make selective arrests makes acute the danger that politics will motivate the exercise of that power. The Court has wisely stressed the avoidance of such abuse." *Rutzick, Offensive Language and The Evolution of First Amendment Protection,* 9 Harv. Civil Rights and Civil Liberties, 1, 28.

In any event, and more to the point here, *this communication takes place in a theatre, not on the streets,* a fact totally ignored by Judge O'Sullivan. The audience is forewarned so that there is no attempt to thrust this language upon an unwilling audience. Here, there is "no evidence to indicate that [the] speech amounted to a public nuisance in that privacy interests were being invaded . . . in an essentially intolerable manner." *Hess* v. *Indiana, supra* at 108. To hold, therefore, that this language by itself is sufficient to withdraw protection of the first amendment is to deny that the live theatre can depict the manner and expression of a sizable subculture of the United States population. The statement carries its own refutation. We think it apparent that here the language "considering [its] content and its placement", at the minimum, "bears some of the earmarks of an attempt at serious art." *Kois* v. *Wisconsin,* 408 U.S. 229, 231.

Point IV. The Record Does Not Support a Finding that HAIR Is Obscene.

A. *Respondents Have Failed To Meet Their Burden of Proof.*

Respondents rightly concede[33] that the burden of proof on obscenity rests with them. *Blount* v. *Rizzi,* 400 U.S. 410, 417; *Healy* v. *James,* 408 U.S. 169, 184. Unless one concludes that it is self-demonstrating from the libretto

[32] In any event, considerations of institutional stability require that those cases be followed unless the bar is to assume that *stare decisis* has absolutely no role in constitutional adjudication.

[33] Tr. Vol. 2, p. 5.

alone that HAIR is hard core obscenity then, *on respondents' evidence alone,* the courts should have held that, as a matter of law, respondents have not met the burden of proof.

Respondents' case consisted of the testimony of four witnesses. The first, Mr. Steve Conrad, is Commissioner of Public Utilities, Grounds and Buildings. Apart from reading the libretto into the record, Mr. Conrad's testimony was, to say the best, marginal. He readily conceded that he had absolutely no expertise in the theatre (App. p. 54), missed many of the lyrics (App. p. 55) and that his own personal ideas and opinions were at stake. (App. p. 54) Even he, however, recognized that the play had a message (e.g., App. p. 55).

Respondents next witness was Mr. William Trasher (App. p. 57) a Chattanooga attorney. He had seen the play 1½ years before and had walked out at the end of the first act. (Indeed, he was unsure as to how many acts the play had, App. p. 59.) He too readily admitted his lack of knowledge about the theatre: "I could tell you about baseball and football but I don't know much about the theatre" (App. p. 60). His reason for leaving the theatre is simply stated at App. p. 59. He was "revolted" by the "blasphemy and sacrilegious attitude" of the play, its "desecration of the American flag" and its "belittlement of the United States Government" which means, of course, that he understood and rejected what he perceived to be HAIR's message.

The third witness was a medical doctor, John Ellis (App. p. 61), who saw the play in England. He testified that it offended his sense of decency (App. pp. 62-63). Rather grudgingly, he conceded that the play had a message, i.e., "ignore what your parents say, ignore what the school says, ignore the church and come live in the street with us." (App. p. 63).

The final witness for the respondents was Mr. Rickets, a life insurance underwriter who was a member of the auditorium board. He too conceded that the play had a message (App. pp. 64-78). His testimony has an interesting twist to it. He expressly disclaimed any expertise in the theatre and said that he was testifying as an "average citizen in Chattanooga" (App. pp. 76-77). But he had some above average experience. He was in the United States Marshall's Office for 16½ years. While there, he said "we confiscated many films and I have seen them there", apparently wholly on his own initiative (App. p. 77).

Apart from the libretto itself, this slender evidence constituted respondents' case on obscenity. Can it be seriously asserted that this evidence provides a sufficient basis for concluding that a theatre performance which has played in over 140 cities in the United States and has been widely acclaimed, can be suppressed in *Chattanooga!* All that is involved here is the testimony of witnesses who have not the slightest basis for giving "expert" opinion on any material issue. Not one of respondents' witnesses testified, or could testify, with respect to what are contemporary community standards (national or local) as to what is acceptable not for the city streets but *for live theatre.* See *United States* v. *Klaw,* 350 F.2d 155, 166-67, 170 (no evidence in record of prurient appeal). *Jenkins* v. *Georgia,* 417 U.S. —, —. Moreover, each of the witnesses grudgingly conceded that the play communicated ideas.

It would reduce the free speech guarantee to a nullity if respondents' testimony were adequate to support the finding that the play was obscene. All that is shown here is opposition to HAIR and what it stands for. But access to a municipal auditorium "may not be refused to a production because it is not the type of entertainment which appeals

to the auditorium board." *City of Mobile, supra,* 457 F.2d at 341. It is in fact, outrageous in the extreme to think that American citizens in New York, Los Angeles, Chicago, San Francisco, Seattle, Las Vegas, Boston, *Memphis* and *Nashville,* not to mention citizens in virtually every major capital of the Western world as well as Tokyo, Sydney, and Tel Aviv can see this important play but that these respondents can decide that the citizens in Chattanooga and its surrounding area cannot see it in a municipal auditorium. Petitioner submits that the constitution of the United States prohibits such gross censorship; it prohibits this effort to reduce the residents of Chattanooga to the status of second class citizenship.

Wholly apart from the affirmative evidence in support of HAIR,[34] therefore, it is plain that there is no acceptable basis in this record for concluding that HAIR is obscene.

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[34] While the Court has the power to canvass the record and make its own determinaiton on HAIR's protected character (see page 29, *supra*), we recognize that the Court may decide to leave to the lower court initial determination of HAIR's obscenity *vel non* once the correct standards are articulated. We summarize here, however, the evidence in favor of the play should the Court decide to resolve the matter for itself. There was substantial evidence in the record that HAIR satisfied none, let alone all, of the elements which must be present if a finding of obscenity is to be sustained.

Specifically:

1. *Appeal to Prurient Interest.*

The dominant theme of HAIR, taken as a whole, does not appeal to a prurient sexual interest. The "dominant theme" of HAIR is not sex, nudity, or anything of that nature. HAIR is concerned with the world of the alienated young—with Vietnam, racism, drugs, love, etc. (App. pp. 79-96) The nude scene is plainly not designed to "appeal to a shameful or morbid interest in nudity, sex, etc." *Roth* v. *United States*, 354 U.S. 476, 487 n.20; *Cohen* v. *California*, 403 U.S. 15, 20. Its setting is symbolic, not erotic. (App. pp. 97-98)

2. *Patent Offensiveness.*

HAIR is not "patently offensive"; it does not affront contemporary community standards relating to the description or representation of sexual matters *in the live theatre.* (App. pp. 90-91)

B. *The Judge Erred in Not Seeing the Play.*

That this record is insufficient to support a finding of obscenity is apparent for another reason. In this case both the district judge and the panel of the court of appeals ruled that HAIR was obscene without even viewing it, and despite substantial record evidence of the play's protected character. This was plain error. Surely *on this record* the courts below were bound by the record evidence in favor of the play.

Paris Adult Theatre v. *Slaton,* 413 U.S. 49, 56, does not point to a different result. To be sure, the Court there held that the judge was not bound by the expert opinion evidence in favor of the movie. But in *Slaton* the state court had viewed the challenged material. (See *Kaplan* v. *California,* 413 U.S. 115, 121) Moreover, the materials at issue were "hard core pornography [which] can and does speak for itself." (413 at 56 n. 6; *id.* at 51-52.) See also *Kaplan* v. *California, supra,* 413 U.S. at 116-117. Here, by contrast, all the courts below had before them were the libretto and, as we have said, respondents' patently weak testimony. The district court "findings" were, therefore, made in the dark.

Unless the unprotected character of the material is self-demonstrating, we know of no decision which would au-

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The use of four letter words can hardly be thought to deprive the speech of its protected character, as the judge recognized. See p. ___ supra. Moreover, these very words are used in the phonograph album which has sold almost countless copies in every city and town throughout this country. In addition, HAIR has played in innumerable other American and foreign cities (App. pp. 106-107), a fact not to be ignored in determining whether it is patently offensive for live theatre.

3. *Serious Value.*

Defendants could not rationally allege that HAIR is "without serious literary, political and artistic value." *Miller* v. *California,* 413 U.S. 15, 26. The widespread critical acclaim received by HAIR throughout the country demonstrates that fact. In *Southwest Produc-*

thorize a court to disregard totally the evidence of non-obscenity. E.g., *Attorney General* v. *A Book Named "Naked Lunch"*, 351 Mass. 298, 299 (1966) ["Although we are not bound by the opinions of others concerning the book, we cannot ignore the serious acceptance of it by so many persons in the literary community"]. *United States* v. *Klaw*, 350 F.2d 155, 170 [It "is the record and not our feelings that must control"]. Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 Yale L. J. 127, 150-51 and note 115. There was substantial record evidence demonstrating that HAIR is a serious and widely acclaimed art work — to say nothing of the patently weak testimony that the play is obscene. Here the courts below disregarded favorable evidence without even seeing the play, and without a finding that it was impractical to do so.[35]

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tions, Inc. v. *Freeman*, (D. Ark. 1970) at page 7, Judge Eisel characterized the matter as follows:

> "The principal characters in the production are definitely not from the 'straight' world. Rather they are a collection of the disenchanted, the dropouts from conventional society: the young, the poor and the black, experimenting with new life styles, and yet still trying to confront established society on what they believe to be the 'real' issues: war, poverty, racism and the hypocrisy of their elders. Their language is from the street and of their generation. Whether what is said has any merit or validity or, indeed, whether it is said well is irrelevant for our purposes. That the play, taken as a whole, does make statements relating to important social, moral and political issues is, however most relevant under the tests mandated by the decisions of our courts."

There was ample testimony in this record to support Judge Eisel's characterization. (App. pp. 79-110) Even the defense witnesses conceded this fact, as we have shown.

[35] The necessity for viewing the play, at least absent the showing that such procedure is not practically available, is not obviated by the judge's footnote (Pet. p. 42; 341 F. Supp. at 474 n.4) that the play is "substantially modified from time to time and place to place". If that is so, it is difficult to comprehend what in this record supports *any* of the judge's findings since all the oral testimony was based on exhibition of the play elsewhere. Moreover, we are not told

We need not determine whether a judge could act to issue a warrant or deny interim relief on the record made in this case. Here the judge entered a *final* decision on the merits after a trial without making any effort at seeing the play. Respondents flew to see HAIR on the eve of the trial. (App. p. 56) While the burden of expense would seem to follow the burden of proof, the judge never inquired whether petitioner would bear the expense of his travel. The judge should have done so.[36] The alternatives which do least damage to the free speech interest must, of course, be utilized where reasonably available. E.g., *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 101 n. 8 (collecting cases). If for any reason it were not practicable for the judge to see the play, a separate issue would of course be presented, but here there is no such showing of impracticability. The reason that the judge never considered seeing the play seems apparent: he believed that the play's libretto plus respondents' testimony and his view of the appropriate criteria for determining the obscenity issue were all that he needed. That was plain error.

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how HAIR "changes" in any way *material* to the issue before the judge. Surely, the fact that there is considerable "action" in the play does not mean that there is any material change in detail. Like any play, HAIR has an integrated theme and any changes from performance to performance, if they exist at all, are simply in its nuances. That the judge felt able to make findings about the "obscene conduct" in HAIR is a recognition of this fact. Finally, the judge's finding of "changes" is contrary to the *express stipulation between the parties*. (App. pp. 31-32). Not surprisingly, neither the respondents nor the court of appeals made mention of this below.

[36] In *Southeastern Promotions, Ltd.* v. *Cervantes*, No. 26463-F, a state court judge in St. Louis flew to Kansas City to see a production of the play and after so doing ruled in its favor.

Conclusion

The judgment should be reversed.

Respectfully submitted,

JOHN ALLEY
4845 Hixon Pike
Hixon, Tennessee 37343

GERALD A. BERLIN
73 Tremont Street
Boston, Mass. 02108

HENRY P. MONAGHAN
10 Post Office Square
Boston, Mass. 02109

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
Petitioner,

v.

STEVE CONRAD, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS

EUGENE N. COLLINS
RANDALL L. NELSON
400 Pioneer Building
Chattanooga, Tennessee 37402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

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United States Constitution, Fourteenth Amendment 1, 22, 25, 26, 30

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
Petitioner,

v.

STEVE CONRAD, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

Petitioners have averred that only the First and Fourteenth Amendments to the United States Constitution are involved. Respondents would show that the case also involves Chapter 510 of the Public Acts of the State of Tennessee of 1974, which will be codified as Tennessee Code Annotated §§ 39-3001, et seq., Tennessee Code Annoted § 39-1013, and Chattanooga City Code §§ 25-28 and

6-4 all of which are fully set forth in Appendix A hereto at pages (45-46), (47), and (45) respectively.

STATEMENT OF THE CASE

Introduction

Petitioner herein sought to present the stage production "Hair" at the municipal facilities under the control of the respondents.

As petitioner has averred, "Hair" is a well-known production, having played in numerous cities. In the years 1970 through 1972 its road companies sought to play in various smaller cities throughout the South. As stated, many local officials, in tune with the standards of their communities, and particularly those in the so-called "Bible Belt," resisted the presentation of this notorious production.

It was the pattern of petitioners herein to wait until the last minute before they wished to play "Hair" and then to rush into a city demanding use of municipal facilities. When the facilities were denied, they would immediately seek a preliminary show cause hearing in the federal district courts, at which they would seek immediate final relief of being granted the use of the facilities on the dates they desired. *Southeastern Promotions, Ltd.* v. *Atlanta,* 334 F. Supp. 634; *Southeastern Promotions, Ltd.* v. *Mobile,* 457 F.2d 340; and *Southeastern Promotions, Ltd.* v. *City of Charlotte, N. C.,* 333 F.Supp. 345. This strategy had the dual result of publicizing their production for them in local newspapers as well as severely restricting the time and manner local municipal attorneys had to prepare their cases. On those occasions where the local governments were successful in the district courts, appeals were immediately

taken and expedited hearings sought and granted in the appellate courts. *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F.2d 1016 (5th Cir.); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Oklahoma,* 459 F.2d 282 (10th Cir.). In most cases, contrary to the instant case, obscenity was not raised as a defense, probably because time did not permit or, more likely, because under the then prevailing law, a national standard existed rather than the community standard subsequently enunciated in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 27 L.Ed.2d 618.

No other of the cases involving petitioner's production of "Hair", raised the issue that the obscene conduct occurring on the stage in the production, as opposed to the written scenario, is not protected "speech".

Proceedings In The District Court

Petitioner herein brought this action in the District Court November 1, 1971, alleging that two days previously, on October 29, 1971, it had requested of respondents the right to present the stage production "Hair" during the period of November 23, 1971, through November 28, 1971, less than one month from the desired date. The request was denied, and this action was brought just three weeks and one day before the desired dates. The original complaint, itself, averred that nudity would occur on stage. (App. 9)

A show cause hearing was held shortly thereafter at which respondents raised the issue that the production would violate the terms of the standard lease agreement plaintiff was seeking because acts are performed in the production which violate the provisions of laws of the State and City, in direct contravention of the terms of the lease (Ex. 3, P. 29-30). Respondents further averred that "due process" afforded them the right to prepare a defense and that final

relief should therefore not be granted in view of the petitioner's delay in seeking the dates. The preliminary relief was denied and thereafter respondents filed a motion to dismiss averring, *inter alia*: (1) that the complaint failed to state a cause of action in that the plaintiff had no right to contract with respondents because it averred acts would occur which would violate both City and State laws and that said acts would thereby be a violation of the terms of the standard lease sought; and (2) that the complaint failed to state a substantial federal question or constitutional issue.

The motion to dismiss was taken under advisement by the Court; and thereafter, on March 16, 1972, plaintiff amended its complaint to request the booking date of April 9, 1972, at the Memorial Auditorium, and the plaintiff further asked for an expedited hearing. Subsequently, on March 23, 1972, the judgment on the motion to dismiss was reserved; the defendants were given ten (10) days to answer; and the cause was set for hearing on the tenth day, April 3, 1972.

Defendants' answer was filed March 31, 1972, and while relying on the motion to dismiss, it further averred, *inter alia*, (1) violations of the obscenity laws of the City and State would occur if plaintiffs were successful; (2) that no First Amendment rights were involved because the First Amendment does not protect conduct which is contrary to a valid State law upholding a substantial State interest; and (3) that the First Amendment does not protect obscene language or conduct such as that plaintiff sought to exhibit to the public.

The cause came on to be heard on April 3, 1972. The issues submitted to an advisory jury, empaneled by the Court, were: (1) whether or not the production "Hair" was obscene within the definition of obscenity as

it relates to freedom of speech under the First Amendment; and (2) whether or not conduct, apart from speech or symbolic speech in the production "Hair", was obscene within the definition of obscenity as it relates to conduct.

STATEMENT OF FACTS

As the Court found (Petition Appendix A, p. 39) and as amply supported by the record (Tr. 33-4, 97, 223-4, 316, 324), the first act of "Hair" closes with from anywhere from six (6) to twenty-eight (28) actors and actresses standing absolutely nude in full view of and facing the audience for a period from thirty (30) seconds to four (4) minutes. While the lighting is somewhat subdued, the private parts of the actors and actresses are definitely visible (Tr. 224). No mention of this scene is made in the script (341 F. Supp. 473, Tr. 229) nor is it accompanied by dialogue.

The production is further replete with acts of obscene, lewd and indecent conduct, as found by both the Court and the jury, both in conjunction with and absolutely apart from any dialogue, song or reference to the theme of the play. The scene and tone are set prior to the first act by a female performer sitting center stage with legs wide apart revealing the design of a cherry on her levis covering her genital area (Tr. 220). Shortly thereafter the first scene starts and the first character to speak introduces himself, and in so doing makes an anal finger gesture to the audience (Tr. 313). He then takes off his trousers, flinging them to the audience; and, dressed only in red jockey shorts with beads hanging therefrom, identifies his genitals by the line, "What is this God-damned thing? 3,000 pounds of Navajo jewelry? Ha! Ha- Ha!" He then leaps into the audience, picking out a female member of

the audience in the front rows, sits on the back of a chair facing her, and spreading his legs, exclaims, "I'll bet you're scared shitless." (Tr. 221, 341 F.Supp. 473).

Back on stage he goes through a simulated masturbation using the beads hanging from his jockey shorts (Tr. 221).

Often conduct occurs on stage without any reference in or to the script, dialogue or plot. In one scene the character Burger lays flat on his back; and, utilizing a red microphone which he places in an upright position in his crotch, simulates a complete masturbation (Tr. 24, 223). In another scene, a male and female go through all the motions of sexual intercourse while standing and embracing each other when another male embraces the female in a front to back position, forming a threesome, after which two more males attach themselves to the line, behind the second male, in a similar position, all the time simulating intercourse, front to back, after which the female says, "I want to thank that last guy" (Tr. 79, 141, 222). Another scene included actors placing their feet between each others legs and tickling with their toes (Tr. 264), a scene where one actor, on his knees and with his face at another actor's crotch, says, "I think I will eat you," to which it is replied, "If you do, you will have to clean it up," (Tr. 117) all without reference in or to the script. In another scene an actor twice feels an actress's breast (Tr. 27, 68).

In other instances, obscene acts are performed on stage in conjunction with dialogue found in the script: two males simulate sexual relations with each other (Tr. 69-70); two rapes are pantomined in full detail (Tr. 89); three males lying flat on their backs repeatedly thrust their genital areas upward as three females sing on a platform twenty feet above them (Tr. 107); as the words "Fly United" are exclaimed, an actress and actor shuffle across

the stage with the male genital area in the buttocks of the female, accompanied by motions (Tr. 109). As an actor says "Rape our buffalo," he thrusts his genital area toward the audience and then says, "Don't knock it if you haven't tried it."; a bed scene of simulated sexual intercourse (Tr. 129, 334); and a scene where a male actor professes to be in love with Mick Jagger and lies down on top of a poster of him making sexual movements.

It is further shown that the simulated sex acts were simulations only by reason of the fact that the players were clothed. Sex acts were actually performed on stage; the only thing missing being that they were done while clothed (Tr. 315, 197, 25, 135).

It was further shown that these simulated sex acts occurred frequently on stage, involving: one male and one female; several males and several females, face to face, both standing and on the floor; frequent instances of simulated acts with the male behind the female; male to male acts, both face to face and front to back; instances of females simulating a sex act with their mouths in very close proximity to the male genitals; and frequent acts of males grabbing at other males' genitals (Tr. 140-141).

The above statement of facts all relate to conduct and not to the "street language" which was used and some of which was quoted in the Court's Memorandum (341 F. Supp. 473).

No issue was ever made by petitioner as to the occurrence of this conduct and, in fact, many of these acts were specifically admitted by petitioner's president (Tr. 332-334). As the District Judge found, every witness who had seen the play testified that repeated acts of simulated sexual intercourse take place. They were often not connected with any dialogue and were not reflected in the script.

The crux of the District Judge's opinion (found on page 43 on the Petition for Certiorari) is as follows:

> "Obscenity, however, as it relates to theatrical productions, can consist of either speech or conduct or a combination of the two. It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment."

The issues were submitted to an advisory jury, empaneled by the Court, were: (1) whether or not the production "Hair" was obscene within the definition of obscenity as it relates to freedom of speech under the First Amendment; and (2) whether or not conduct, apart from speech or symbolic speech in the production "Hair", was obscene within the definition of obscenity as it relates to conduct.

Both the advisory jury and the Court found that the theatrical production "Hair" contained conduct, apart from speech or symbolic speech, which rendered it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances of the City and of the statutes of the State of Tennessee. It was, therefore, held that the defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium and the Tivoli Theatre unto the plaintiff.

Further, the Court held that even on the assumption that the alleged communicative element of the exhibition brought into play the First Amendment, the laws in question met the tests set forth in *United States* v. *O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), and that the defendant board was justified in denying plaintiff access to the auditorium.

Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment was affirmed on the opinion of the District Judge with both Judges Weick and O'Sullivan adding comments after adopting the opinion of the District Judge with Judge McCree dissenting.

Senior Circuit Judge O'Sullivan correctly categorized petitioner's argument when he said:

> "Their argument appears to be that obscenity must be tolerated if it is a part of the same vehicle whereby First Amendment rights are allegedly being exercised."

He then held in most cogent manner:

> "We agree with the District Judge that free speech cannot be used as a vehicle to carry obscenity — thus to allow, without limit, public exhibition of obscenities. . . . Whether the play is considered separately as to its speech and conduct, or they are joined, it is obscene."

Judge Weick concurred, pointing out that the First Amendment protects expression, not action, and that "No one has a constitutional right to exhibit obscene sexual acts in public buildings."

On Motion to Rehear with Suggestion of Rehearing En Banc, the Suggestion was overruled by a 7-2 vote and the Petition denied by the same majority which affirmed the original decision.

SUMMARY OF THE ARGUMENT

Point I of the respondents' argument is directed to the fact that the respondents applied acceptable standards and criteria to the use of the municipal auditorium in question.

Petitioner asserted that no standards exist or, at most, that the statement of policy dating back to the dedication of the building was the sole test applied, completely ignoring the fact that the standard form lease it was seeking clearly set forth and required all lessees to abide by all the laws of the United States, the State of Tennessee, and the City of Chattanooga. These laws include statutes and ordinances forbidding public nudity, obscene conduct, and specific sexual acts or simulations thereof, all of which admittedly appear in the production "HAIR". It is further shown that these are valid laws and meet the standards previously enunciated by this Court.

Point II of respondents' argument then demonstrates that the laws set forth in Point I were validly applied to the production, both by the respondents and then by the courts below. It was and is respondents' position that the conduct which is presented in "HAIR" is in violation of valid state laws and city ordinances which were not directed at inhibiting free speech and that such conduct is not protected, as claimed by the petitioner, by the First Amendment simply because it is a part of the same vehicle by which petitioner allegedly is seeking to express various ideas. Respondent respectfully submits that freedom of expression is not protected when so closely brigaded with illegal action as to become an inseparable part thereof. In other words, where illegal conduct is not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, it is not speech and it is not protected by the First Amendment. The conduct in "HAIR" patently falls within this category because the undisputed evidence is that frequent obscene acts occur therein which have no reference to any dialogue, script, or theme of the work as a whole.

Further, even on the assumption that First Amendment protections are thrown about the production, the respon-

dents' actions were proper under *United States* v. *O'Brien*, supra, since all the tests therein set forth are met by the statutes and ordinances applicable to the production. Further, their actions are sustained by the long-standing rule of law that expression may be reasonably regulated by public authorities as to time, place, and manner. Here, the manner of conduct, coupled with the public forum in which it takes place, dictates the propriety of respondents' denial of the lease to the petitioner.

Point III demonstrates that respondents' action was not invalid for having not instituted the judicial review. At the risk of oversimplification, this is because: (1) petitioner failed to raise the point before the District Court; (2) inherent differences in the media require different standards to be applied to stage productions than are applied to films and literature; (3) ample state legal remedies were available to the petitioner; (4) no issue was raised as to the contents of the production, just as to the conduct therein, which conduct has been admitted, averred, and stipulated by the petitioner; and (5) an adversary hearing was held before the dates requested by the petitioner, in which hearing respondents position as to conduct was vindicated, so that in no event was petitioner prejudiced.

Point IV points out that the petitioner totally ignored the facts found by the District Court, amply supported by the record, when petitioner baldly asserted that respondents had failed to meet the burden of proof imposed upon them. In reciting the facts on which petitioner alleged respondents rely, petitioner failed to mention a single sex act, obscene act, or act of nudity despite the fact that numerous such acts were conclusively proved and even admitted in the District Court. Further, petitioner's allegation that the judge erred in not seeing the play is inappropriate in view of the fact that it never asked the Judge to do so or made a

motion to that effect or even raised the issue before the District Court. The added fact that petitioner waited until the very last minute before demanding immediate hearings and thereby gave the Judge no time or opportunity to see the production makes this allegation seem particularly inappropriate and without foundation. Further, petitioner was in sole control of the company of actors and therefore it was its duty, if anyone's, to introduce this piece of evidence. The fact that it did not choose to do so is an admission that this evidence would have been adverse to petitioner.

Hence, it is respectfully submitted that the petition and brief of the petitioner are without merit and the courts below should be affirmed.

ARGUMENT

POINT I. There is No Lack of Constitutionally Acceptable Standards Governing The Use of The Municipal Auditorium.

Most simply put, respondents' objection to permitting use of municipal facilities for the production "Hair" is based on the conduct therein and not the content thereof.

Unlike the cases recited in Petitioner's Brief, this is not a case where the use of the facility would be left to the unbridled discretion of an individual. Here, there were and are objective standards set forth which petitioner has chosen to ignore. The standard lease agreement which petitioner sought clearly and specifically provides (Ex. 3, App. 28):

> "This agreement is made and entered into upon the following express covenants and conditions, all and every one of which the lessee hereby covenants and agrees with the lessor to keep and perform . . . that

> said lessee will comply with all laws of the United States and the State of Tennessee and all ordinances of the City of Chattanooga and all rules and requirements of the Police and Fire Departments or other municipal authorities of the City of Chattanooga . . ."

Petitioner has never given any assurance that there could or would be compliance with this provision, applicable to all lessees of the facilities. Instead, it has never denied and, indeed, has averred[1] and admitted[2] that the production contains nudity which would be violative of at least one City ordinance and the Tennessee common law against indecent exposure.

Section 25-28, Part II, Chattanooga City Code expressly provides:

> "Sec. 25-28. *Indecent exposure and conduct.*
> It shall be unlawful for any person in the city to appear in a public place in a state of nudity, . . . or to do any lewd, obscene, or indecent act in any public place."

Patently and admittedly, conduct occurs in "Hair" violative of this provision of the law and hence, of the lease which petitioner seeks and which is applied to all lessees. There is no vague standard — public nudity is illegal — nor is there an unconstitutional application of the law. The chairman of the defendant board testified that never, to his knowledge, has the respondent board ever allowed a production at a municipal facility where public nudity was involved (App. 26, 27, 48), nor where sex acts were acted out on stage (App. 48).

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[1] The complaint states: "The plaintiff alleges upon information and belief that the production "Hair" which it seeks to show in the City of Chattanooga displays very little nudity per se . . . (App. 9)

[2] Appendix pp. 23, 106.

Mr. Conrad further testified that the auditorium was dedicated for clean, healthful entertainment which will make for the building of a better citizenship (App. 26) and that these facilities have never been closed to minors or children (App. 27). Yet, Tennessee Code Annotated § 39-1013 (b) provides:

> "It shall be unlawful: . . . (b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sadomasochistic abuse and which is harmful to minors.

Clearly, the exhibi on of "Hair" before minors who have never been excluded from these public premises would likewise be illegal. (Tennessee Code Annotated § 39-1013)

Every witness who testified who had seen the play, the petitioner's witnesses as well as the respondents', verified the fact that actors and actresses appear on stage in the nude, which is a direct *per se* violation of the above law as well as Tennessee law on indecent exposure.[3]

Certainly, a standard which prohibits nudity in a public place is more than adequate. This is not a broadly worded licensing ordinance as alleged by plaintiff, but a narrow, carefully defined prohibition of specified *conduct*, which prohibition is violated in the exhibition sought to be performed. That such conduct can validly be proscribed is sustained by *Miller* v. *California*, 413 U.S. 15, 93 S.Ct. 2607, 27 L.Ed.2d 648, wherein this Court said:

> "Sex and nudity may not be exploited without limit

[3] Cf. *Ryall* v. *State of Tennessee*, 204 Tenn. 422, 321 S.W.2d 809.

> by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places."

Even aside from the public nudity involved, the exhibition violates the City ordinance above set forth as it relates to lewd and obscene acts in a public place. This, too, is a sufficiently precise proscription. The same words were considered in *Roth* v. *United States*, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957). The only difference in the two cases, as to these words, is that in *Roth* they were applied to written material whereas here they are applied to conduct.

The appellant in *Roth* argued that the words, "obscene," "lewd," "lascivious," "filthy," and "indecent" were not sufficiently precise, but this Court expressly rejected this contention, citing extensive authority (354 U.S. 491, 492, 1 L.Ed.2d 1510, 1511). As this Court there said:

> "These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and make '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambigous to define a criminal offense.' "

Here, there can be no doubt but what these words and standards apply to the conduct in "Hair". This is not even a marginal case. Both the jury, after being properly instructed, and the Courts below have concurred with the respondents.

Further, since the time certiorari was granted in this case, the Tennessee Legislature has passed Chapter 510 of the Public Acts of Tenessee of 1974 (see appendix hereto), Section 3 (a) of which Act specifically makes it "unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production obscene is guilty of said offense." Section 2 of said Act further proscribed sexual conduct, all of which conduct patently appears in "Hair" under all of the proof above enumerated. Further, under Section 5 of said Act, it is clear that any contract to show or present the conduct found in "Hair" would be an illegal contract.

Thus, it can readily be seen that there is no lack of constitutionally acceptable standards governing the use of the municipal auditorium.

POINT II. Standards Where Validity Applied.

(1) Conduct in Violation of Valid Laws Is Not Protected By the First Amendment.

Petitioner has taken the position as stated by Judge O'Sullivan that obscenity must be tolerated if it is a part of the same vehicle whereby First Amendment rights are allegedly being exercised. It alleges that under the guise of the theatrical, any obscene act or acts may take place in a public forum so long as the production as a whole had utterly any redeeming social value.

Patently, petitioner is simply ignoring the classic and definitive differences between the theatre and the other modes of entertainment (e.g., moving pictures, literature, etc.) with which it seeks to equate the theatre. By its very nature theatre differs from other entertainment forms

in that, in a stage production, the line is crossed from mere descriptions or depictions of conduct to actual conduct performed before an audience. As recognized in several cases, each medium tends to present its own problems, *Burnstyn* v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403. What may be protected in a book might not be in a film, and what might be in a film, might not be in live theatre. *United States* v. *A Motion Picture Film Entitled, "I Am Curious Yellow",* 404 F.2d 196 (1968); *PBIC* v. *Byrne,* 313 F.Supp. 75; stay den. 90 S.Ct. 1718, 398 U.S. 916, 26 L.Ed.2d 82, vac. 11, 91 S.Ct. 1222, 401 U.S. 987, 28 L.Ed.2d 526 (1970). The application of tests of obscenity to different media should take account of the differences inherent in those media. In a stage production, not only do the players actually engage in conduct even where a script, libretto, etc. is rigidly adhered to, but, because of the fact that the conduct is not set in celluloid, on paper, or so adapted that it must be the same for every performance, that conduct is subject to change from performance to performance. Further, this same factor makes it possible, or even probable, that acts can and do occur which have no reference to or part in the dramatic performance. This is what the District Court found in the case at bar: that acts occur which have no place in or reference to any dialogue, script, or theme of the exhibition, and that because this conduct was not speech, or so illustrative thereof as to constitute speech, it is not protected by the First Amendment.

As most recently reiterated in *Kaplan* v. *California,* — U.S. —, 93 S.Ct. 2680, 37 L.Ed.2d 496-7:

> "When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the

expression. See, *Roth* v. *United States*, 354 U.S. 476, 481-485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). *Obscenity can, of course,* manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct." (emphasis supplied)

Both the advisory jury, after being charged by Judge Wilson with a charge which, with but one exception, foresaw the standards later adopted by this Court in *Miller, supra,* and the Judge, himself, in consideration of these standards, found the conduct in "Hair" to be obscene. This finding was based on the above set forth facts, which were never denied and which have been ignored in both briefs filed by petitioner in this Court, and which facts justify a finding of obscene conduct.

That conduct cannot be condoned merely, as petitioners contend, because it occurs on the stage. As this Court said in *Paris Adult Theatre I* v. *Slaton,* — U.S. —, 93 S. Ct. —, 37 L.Ed. 446:

> "Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theatre stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

This, in effect, reiterates Judge Wilson's holding that to be protected by the First Amendment, conduct must be so closely illustrative of speech as to be speech or symbolic speech. Here, obscene acts occurred without any reference to speech, dialogue or theme of the production, as in the above example given by this Court.

That conduct which is not speech, symbolic of speech or expressive of speech is not protected by the First Amendment has long been the law of the land.

In *Giboney* v. *Empire Storage and Ice Co.,* 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949), this Court said:

> "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."
>
> . . .
>
> "But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."

Similarly, the principle that First Amendment protection will not be given to illegal conduct, even though interrelated with speech, was reiterated by the Court in *Cox* v. *Louisiana,* 379 U.S. 536, 13 L.Ed. 2d 471, 85 S.Ct. 453 (1965). Therein, the Court stated, as in *Giboney,* that it was dealing with a case not alone concerned with free speech, but also with expression mixed with particular conduct. The Court held:

> "We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."

In another case with the same style, decided the same day, at 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453, the Court again spoke to this problem:

> "We emphatically reject the notion urged by appel-

lant that the First and Fourteenth amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Without further belaboring the point, the Court has reaffirmed these views several times. *Adderly* v. *Florida*, 385 U.S. 39, 47, 48, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966); *Walker* v. *City of Birmingham*, 388 U.S. 307, 315, 316, 18 L.Ed.2d 1210, 87 S.Ct. 1824 (1967); *United States* v. *Miller*, (C.A. 2) 367 F.2d 72, 79, cert. den., 386 U.S. 911, 17 L.Ed.2d 787, 87 S.Ct. 855 (1967).

It is interesting to note that the *Adderly* case rejected the premise that people who want to propagandize protests or views have a constitutional right to do so whenever, however, and wherever they please. It further held that the state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. Thus, so long as the same standards are applied to all applicants, (e.g. that all applicants must agree to obey the applicable city and state laws), no constitutional right of the petitioners herein is denied by the refusal to grant them the use of the property.

In the case of *Roth* v. *United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), the case from which obscenity standards have emanated, even the vigorous dissent recognized the difference between the regulation of speech as covered in the *Roth* case and that of conduct. Therein, Mr. Justice Douglas said:

"I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals.

No one would suggest that the first amendment permits nudity in public places, adultery, and other phases of sexual misconduct." (emphasis in the original)

Mr. Justice Douglas further went on to recognize that freedom of expression can be suppressed if and to the extent that it is so closely brigaded with illegal action as to be an inseparable part of it.

Thus, it is clear from the above cases, as pointed out in *United States* v. *Eberhardt*, 417 F.2d 1009 (C.A. 4, 1969), that:

"If one elects to engage in conduct as symbolic speech, he must limit himself to lawful conduct; he is not entitled to commit criminal acts with impunity, even in order to communicate ideas."

Prior to "Hair" there have been very few cases dealing with obscenity as it relates to stage plays. Perhaps the outstanding case is that of *Raphael* v. *Hogan*, 305 F.Supp. 749 (S.D., N.Y. 1969). Therein, persons who were associated with the play "Che!" were arrested for obscenity, consensual sodomy, public lewdness, etc. They challenged the arrest on various grounds, one of which was that the First Amendment protects act of deviate sexual intercourse when performed in public if such conduct is a part of a dramatic work. As in the case at bar, the petitioners in that suit contended that the alleged acts of the players were not actually performed but were merely simulated. The Court, citing *Cameron* v. *Johnson*, 390 U.S. 611, 617, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and *Cox* v. *Louisiana*, *supra*, held that:

"It is equally clear that not all conduct intermingled with speech is entitled to greater constitutional protection than would be the case if the conduct stood alone."

The Court went on to hold, as to the proposition that individual acts of sodomy were protected as "part of an artistic whole", in most picturesque language:

> ". . . The prohibited evil is not thus disguised: *it is like pouring cologne on gangrene.*" (emphasis added)

Finally, the Court there held:

> "While conceivably in certain exceptional instances a partial abridgment of speech may result from the regulation of conduct, New York's interest in prohibiting public acts of sodomy on stage warrants the greater protection."

A case similar to the one at bar which, although it did not involve a stage play, did involve the application, or lack of it, of First Amendment standards to public nudity, is that of *State, ex rel. Church* v. *Brown,* 165 Ohio St. 31, 59 Ohio Ops. 45, 133 N.E.2d 333 (1956); appeal dismissed for want of federal question, 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d 82. Therein, a group of people applied to the Secretary of State of the State of Ohio for filing and recording articles of incorporation of a proposed non-profit corporation intended to provide private facilities where members of both sexes could congregate together and in the presence of each other practice nudism. The Secretary of State denied them a charter, based upon the Ohio law that no person should willfully expose his or her private parts in the presence of two or more persons of the opposite sex, etc. Relators contended that the section was unconstitutional, being in direct violation of the First and Fourteenth Amendments to the Federal Constitution in that it abridged their rights to freedom of speech, freedom of the press, and peaceful assembly given by the Constitution. The Court found that the state did

not have to grant the relators a charter because charters could only be granted for a purpose for which natural persons *lawfully* may associate themselves.

Similarly, in the case at bar, contracts to rent the auditorium may only be granted where the lessee agrees to lawfully conduct himself. The Ohio Court affirmed the law in question as a valid exercise of the police power and thereafter this Court dismissed the appeal for want of a federal question, thereby impliedly (1) upholding the state's right to prohibit public nudity under their inherent police powers; and (2) denying First Amendment protection to public nudity in violation of valid state laws.

Other cases denying the application of First Amendment obscenity tests to conduct performed under the guise of communicating ideas of freedom include *Hoffman* v. *Carson,* 250 So.2d 891, appeal dismissed for want of a substantial federal question, — U.S. —, 30 L.Ed.2d 365, 92 S.Ct. —; and *City of Portland* v. *Derrington,* 253 Or. 289, 451 P.2d 111 (1969), cert. den. 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177.

The *Hoffman* case dealt with a dancer who violated a statute relating to exposure of sexual organs and who claimed her performance constituted an interpretation of music in communication of her ideas of freedom to patrons. Similarly, the *Derrington* case related to an ordinance forbidding a female from appearing topless in places where food or alcoholic beverages were served.

In both of these cases the courts decided that the relevant laws were directed toward conduct and not toward the curtailment of speech, and that such conduct was not protected under the First Amendment. It is significant that in the *Hoffman* case, as in the *Brown* case, this Court de-

nied review because of the lack of a substantial federal question, thereby indicating no First Amendment rights were involved in the regulation of public nudity.

In *United States* v. *Hymans,* 463 F.2d 615 (9th Cir. 1972), the Court of Appeals sustained convictions of persons guilty of public nudity as within the rubric of a regulation banning "indecent conduct" in national forests. The court reasoned that public nudity in the proximity of other persons warranted a conviction for indecent conduct, citing *State of Iowa* v. *Nelson,* 178 N.W.2d 434 (1970).

In *Cox* v. *Schneider,* 308 U.S. 147, 160, the Court, in language most pertinent to the case at bar said:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stopage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. *Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."* (emphasis supplied)

Similarly, here, respondents recognize that they have a

duty to permit those who wish to lawfully use the auditorium to do so; however, they also have a right and duty to see that the auditorium is used lawfully. Prohibition of illegal conduct no more violates petitioner's rights here than it would in the facts set forth in the *Cox* case, *supra.*

Theatrical productions differ markedly from movies and literature as to obscene acts because the conduct is live and in the case of obscene acts, even the simulation thereof is illegal. In other instances conduct is illegal because of what is accomplished by the person such as in a murder, robbery, forgery, etc. In these cases the filmed or stage dramatization is not illegal because there is no actual illegal accomplishment. However, where conduct on stage is illegal, as opposed to the simulation of an illegal act, then the conduct may be prohibited because it shares the same evil as the original.

Petitioner herein, by choosing a "live" medium to perform and display sexually obscene acts as the vehicle for the expression of whatever act or ideas it claims to express, has "brigaded" the communication, if any, with conduct and in so doing has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression.

Hence, it is respectfully submitted that the courts below were eminently correct in holding that conduct apart from speech or symbolic speech, in violation of valid laws, is not protected under the First and Fourteenth Amendments.

(2) Even First Amendment Application To the Communicative Aspect of "Hair", If Any, Would Not Require Reversal.

Even if the communicative aspects of "Hair", if any, were within the ambit of the First and Fourteenth Amendments, the lower courts would still be correct, because freedom of expression can be suppressed to the extent that it is so closely brigaded with illegal action as to be an inseparable part of it, as above demonstrated.

Another manner of expressing this is perhaps best couched in the language of the dissent in *Lehman* v. *City of Shaker Heights*, 417 U.S. —, 42 L.W. —, 5120, wherein it was said:

> "Of course, not even the right of political self-expression is completely unfettered. As we stated in *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965):
>
> > 'The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of anarchy.'
>
> Accordingly, we have repeatedly recognized the constitutionality of reasonable 'time, place and *manner*' regulations which are applied in an evenhanded fashion. *See, e.g., Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98 (1972); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972); *Cox* v. *Louisiana*, *supra*, 379 U.S., at 554-555; *Poulos* v. *New Hampshire*, 345 U.S. 395, 398 (1953); *Cox* v. *New Hampshire*, 312 U.S. 569, 575-576 (1941); *Schneider* v. *State*, 308 U.S. 147, 160 (1939)." (emphasis supplied)

Here, it is the manner of presentation that is in dispute. Respondents simply submit that no one is above the law simply because of the vehicle of expression he chooses, and that where the manner of expression is illegal, it cannot be permitted by public authorities in a public facility.

Further, this Court, in both *California* v. *LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and *Miller* v. *California*, *supra*, has indicated that the case of *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), is applicable to conduct on the stage.

Even though neither of those cases had yet been decided when the District Court ruled on the case at bar, Judge Wilson applied *O'Brien* and found that the obscenity laws relied on by respondents, as they related to obscene conduct, met the standards laid down in *United States* v. *O'Brien*,[4] *supra*.

In *O'Brien*, the defendant was tried and convicted for the offense of publicly destroying his draft card. He did so on the steps of the South Boston Courthouse in front of a crowd to influence others to adopt his anti-war beliefs. His argument was that " 'the freedom of expression which the First Amendment guarantees' includes all modes of 'communication of ideas by conduct,' and that his conduct is within this definition because he did it in 'demonstration against the war and against the draft.' "

This Court held:

> "We cannot accept the view that an apparent limitless variey of conduct can be labeled 'speech' whenever the person engaging in the conduct contends thereby to express an idea. *However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amend-*

[4] *Southeastern Promotions, Inc.* v. *Conrad*, 341 F.Supp. 465, 475, 477.

> *ment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.* This court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify the incidental limitation on First Amendment freedoms . . . We think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than it is essential to the furtherance of that interest." (emphasis supplied)

In the case at bar, the laws in question meet all four of the criteria designated by the Supreme Court in *O'Brien*. First, these laws are within the constitutional power of the state and the city. It is axiomatic that a state and a municipality, under their respective police powers may make such reasonable regulations as may be necessary to ensure the safety, health, peace, good order, and morals of the community. *See, Near* v. *Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). *See, also, Berman* v. *Parker,* 348 U.S. 26, 99 L.Ed. 27, 75 S.Ct. 98 (1954), wherein it was held:

> "Public safety, public health, morality, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

Second, the regulations and law involved in this case further important and substantial governmental interests. As stated in *Paris Adult Theatre I* v. *Slaton, supra*:

> "The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. (citing cases) . . .
>
> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, . . ."

Third, it is plain that the government interest involved, that is, the protection of the public health, welfare and morals, is unrelated to the suppression of free speech. Common law indecent exposure, the state laws and the ordinance on public nudity and obscenity plainly are not designated to inhibit freedom of speech, but are for the protection and furtherance of good moral standards within and the health and safety of the community which is a legitimate governmental interest.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. It is evident that the Tennessee common law on indecent exposure and the city ordinance on public nudity and obscenity plainly are not designed the prevention of public exposure of one's body and the prevention of obscene and lewd acts in public. It is evident that the laws involved are not regulations of communication, but are aimed at regulating and punishing public conduct. Hence, this case falls squarely within the terms of *O'Brien* and even the alleged communicative elements of the work does not protect the conduct therein.

It is evident that the reason the plaintiff was denied the use of the auditorium was the non-communicative aspect of its actions, that is, the public nudity and obscenity, and not for the ideas it sought to express. It is not the dissemination by the plaintiff of ideas which defendants here-

in are concerned with, but simply with the conduct involved.

In another recent case, *Younger* v. *Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), wherein the plaintiff sought an injunction against the enforcement of state criminal laws, as the plaintiff did here, on the grounds that they constituted a "chilling effect" on his First and Fourteenth Amendment rights, the Court said in denying the injunction:

> "Moreover, the existence of 'chilling effect', even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but – while regulating a subject within the state's power – tends to have the incidental effect of inhibiting First Amendment Rights, it is well-settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

Perhaps the outstanding case decided since *O'Brien* is that of *State of Iowa* v. *Nelson*, 178 N.W.2d 434 (1970), wherein the Court held that conduct of college students in disrobing at a public meeting held as a part of the college sex education program was not a privileged conduct as an exercise of free speech, notwithstanding that the avowed purpose of disrobing was to protest an alleged exploitation of the female body by Playboy magazine.

The defendant college students in that case made a two-pronged attack on their conviction, claiming first that the lower court erred in holding that public nudity alone constitutes the crime of indecent exposure; and second, the lower court erred in not recognizing that the defendants' conduct was privileged as an exercise of free speech, and

could be punished only upon a showing by the state that the conduct created a clear and present danger to a substantial evil the state may prevent. The defendants therein, as do the complainants herein, further contended that because they did not do any act which might have had an obscene or sexual connotation while disrobed, no public offense was involved. In response thereto, the Court held that the violation is the act of public nudity, combined with the intent to perform the act in a place or in a context in which the act violates recognized and accepted norms of social behavior. With regard to this point, Tennessee Courts have held that upon exposure, the only intent necessary to prove is the general intent to expose oneself, *Ryall* v. *State*, 204 Tenn. 422, 321 S.W.2d 807 (1958).

The Court, in *Nelson*, said:

> "The will or volition of the person charged to expose his person or those parts which 'instinctive modesty, human decency or common propriety requires shall be customarily kept covered in the presence of others', is involved and not a specific intent to say or do anything in particular while so exposed."

The Court then went on to the defendants' second assignment and overruled it, quoting extensively from *O'Brien, supra*. The Court then concluded that:

> "We are forced to conclude the defendants conduct at the time and place in question in completely disrobing, was not privileged conduct as an exercise of free speech."

Another case involving a theatrical performance is that of *Dixon* v. *Municipal Corp. of San Francisco*, 267 Cal.App. 2d 799, 73 Cal.Rep. 587, having to do with the play "The Beard". Therein, it was held that within the context of a play, a ballet, a dance or another performance, action

though accompanied by dialogue or choreography with all First Amendment protection thrown about it, may nevertheless be deemed an unlawful, lewd or obscene act. It further held that the simulation between a male and a female performer of an act of oral copulation, in the course of a performance of a one act play, may be established as obscene. That Court overruled a writ of prohibition by a lower court enjoining a prosecution of the performers.

It is, therefore, respectfully submitted that even on the assumption that the alleged communicative element in "Hair" is sufficient to bring into play the First Amendment, it does not follow that the acts, deeds, and conduct within the production are consitutionally protected activity. When "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *United States* v. *O'Brien, supra.* Such is here the case.

POINT III. Respondents' Conduct Was Not Invalid Because They Did Not Institute Judicial Review.

Petitioner has further alleged that the denial of permission to use the auditorium is invalid because of the failure to provide a prior judicial review.

At the outset, it should be pointed out that this issue was not argued to the District Court. While it was raised in the initial complaint, it was abandoned at the trial level and not resurrected until the case was brought before the Court of Appeals. The District Judge on at least two

occasions permitted oral arguments as to further legal issues the parties wished to raise (app. 110, 116), but petitioner did not avail itself of the opportunities to broach this issue. Thus, it is respectfully submitted that the matter is not now properly before the Court.

However, on the assumption that the issue is properly before the Court, which is denied, it is pertinent that the requirements of *Freedman* v. *Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649, have never been applied to conduct, whether on stage or otherwise, by this Court. Indeed, the language of *Freedman* itself indicates the case is confined to motion pictures. It recognizes the authority set forth above that each medium is not necessarily subject to the precise rules governing other media. This recognition is most important in the instant case because the differences between motion pictures and theatrical productions dictate that a feasible prior adversary hearing for a film would not be possible for theatrical productions. The Court said, in *Freedman*:

> "The requirement of prior submission to a censor sustained in Times Film is consistent with our recognition that films differ from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination. It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission in § 2 recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date — far enough in advance so that the exhibitor could safely advertise the opening on a normal basis."

Here, due to the nature of a play with a script, music, and action, there was no tangible material which could be

submitted to the respondents on which the players' conduct could be evaluated because the players' conduct is spontaneous, not set in celluloid or print, and there is no feasible method, other than the one utilized in the case at bar, by which the conduct of the players may be judged in advance.

There have never been any requirements as to prior adversary hearing for a valid control of conduct. For instance, no prior adversary hearing is necessary before a building permit or petition for rezoning may be denied, or before any other permit can be denied by local officials for conduct over which they have control. If persons are thereby aggrieved, the proper remedy is a suit for writ of certiorari or declaratory judgment, as was brought in the case at bar. Once again, where the line is crossed from speech to conduct, the state's regulatory powers increase.

Most pertinent to this issue is *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403, wherein this Court reiterated from *Near* v. *Minnesota,* supra, that, "The phrase 'prior restraint' is not a self-wielding sword," and it reaffirmed that the State possesses some measure of power to prevent the distribution of obscene matter. Here, as in *Times Film Corp.,* petitioner asserts that the public exhibition of the production must be allowed under any circumstances and that State law may only be enforced after transgression. This Court said as to this proposition:

> "But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment — a claim without sanction in our cases. To illustrate its fallacy, we need only point to one of the 'exceptional cases' which Chief Justice Hughes enumerated in Near v. Minnesota (US) supra, namely, 'the primary requirements of decency [that] may be enforced against obscene publications.' Moreover, we later held specifically 'that obscenity is not within the area of constitutionally protected speech or press.' Roth v. United States, 354 US 476, 485, 1 L ed 2d 1498, 1507, 77 S Ct 1304 (1957). Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent, of such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in Burstyn, 343 US 495, 96 L ed 1098, 72 S Ct 777, supra, that "capacity for evil . . . may be relevant in determining the permissible scope of community control,' at p. 502, and that motion pictures were not 'necessarily subject to the precise rules governing any other particular method of expression. Each method,' we said, 'tends to present its own peculiar problems.' At p. 503. Certainly petitioner's broadside attack does not warrant, nor could it justify on the record here, our saying that — aside from any consideration of the other 'exceptional cases' mentioned in our decisions — the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech."

Here, even if speech issues were involved, the State is not prevented from reasonably regulating the manner and place, and when the manner of conduct is obscene and includes nudity, and the place is public, the State is not stripped of its constitutional power to prevent it.

The situation at bar is analogous to the commencement of a prosecution for possession of obscene materials. There, the prosecutor is not required to afford the defendant a prior hearing on whether the materials are obscene before seeking indictment and/or arrest. Thus, in *Schackman* v. *Arnebergh,* 258 F. Supp. 983 (D. Cal. 1966), appeal dis-

missed 387 U.S. 429, it was held that a judicial proceeding is not a condition precedent to a good faith institution of a complaint and/or arrest for violation of obscenity laws.

Similarly, in *Poulos* v. *New Hampshire*, 345 U.S. 395, 73 S. Ct. 760, 92 L. Ed. 1105, reh. den. 345 U.S. 978, 73 S. Ct. 1119, 97 L. Ed. 1392, this Court held that an official's denial of a license to hold a religious service in a public park, even where it was wrongful, was not a denial of the petitioner's First Amendment rights where redress by state judicial procedures was available against the city council's wrongful refusal of the license. The Court went on to say:

> "It would be unreal to say that such official failures to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution. Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning."

At another point this Court said therein:

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a non sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion. When considering specifically the regulation

> of the use of public parks, this Court has taken the same position."

Here, petitioner had available several state remedies, as well as the federal ones it exercised. First of all, petitioner could have brought an action for certiorari, pursuant to Tennessee Code Annotated §§ 27-901, et seq. Secondly, petitioner could have sought relief under the State Declaratory Judgment Act, Tennessee Code Annotated §§ 23-1101, et seq.

Thus, where criminal conduct on the part of the petitioner is the question, it is respectfully submitted that no prior judicial adversary hearing is warranted or necessary, especially where there is an adequate remedy available.

Perhaps even more important as to this proceeding is that the issue is mooted by the pleadings and proof. The purpose of a prior hearing is to determine whether material contained within the work in question is entitled to protection or is illegal. Here, this was never an issue. The original complaint in fact averred and admitted that public nudity occurred in the production, which under the standard lease was, in and of itself, grounds for denial of the lease. Further, as demonstrated above, petitioner's president readily admitted in his testimony that the various acts occurred in the play which the courts below and advisory jury found obscene. Whether the proscribed conduct involved would occur has never been an issue — only whether that conduct may be banned because it is committed on a stage in a theatrical production.

The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression. Nor does freedom of speech comprehend the right to speak on any subject at any time. *American Communications Association* v. *Douds*, 339 U.S. 382, 394,

70 S. Ct. 674, 94 L. Ed. 925. Thus, one who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which he seeks to speak. *Avins* v. *Rutgers*, 385 F. 2d 151, 153. Complainant here has not shown that he has the right to use the particular medium through which he seeks to speak because he has alleged that conduct which would violate applicable laws would take place. As this Court said in the *Adderly* case, *supra*, the state, no less than a private owner of property, has power to preserve the property under its control for the uses for which it is lawfully dedicated.

Here, the defendants neither took anything from the plaintiff nor enjoined it from doing anything. They simply refused to rent specific property to the plaintiff because plaintiff sought to use it for the purpose of performing *acts* proscribed by valid law. Not one single case has been cited by appellant requiring a prior judicial decision before public officials can prevent illegal acts from taking place on public property.

Instead, defendants would show they are vested with limited good-faith discretion as to the use of public property. In *Cox* v. *Louisiana*, 379 U.S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453, it was provided:

> "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" . . . [and with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the

> highways . . . ."' *Cox* v. *New Hampshire*, supra, 312 U.S. at 576, 85 L.Ed. at 105, 133 ALR 1396. See, *Poulos* v. *New Hampshire*, supra."

Here, the proof showed there was no unfair discrimination. For instance, it was testified that never has there been public nudity permitted in the municipal auditorium.

The mere fact that speech is intertwined with the conduct involved does not mean that the normal First Amendment rights pertain. It was directly held in *Cox* v. *Louisiana*, 379 U.S. 559, 546, 13 L. Ed. 2d 487, 492, 85 S. Ct. 476:

> "We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection."

Again, in *Cameron* v. *Johnson*, 390 U.S. 611, 20 L. Ed. 2d 182, 88 S. Ct. 1335, it was held in a picketing case:

> "Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms."

Nowhere, to appellees' knowledge, has this Court required a prior adversary hearing before responsible public officials could prevent public property from being used to perform illegal acts.

The basic misconception of petitioner is that it contends that here, as in *Freedman*, defendants passed upon the content of speech in order to determine whether it shall be permitted to exhibit. Respondents did not pass upon speech or its content – their sole concern was that the

auditorium not be used for the performance of conduct proscribed by law. To further demonstrate this to be the case, it is to be noticed that Section 25-28 of the City Code nowhere speaks to or attempts to regulate, in any way, speech. Its application to speech is merely incidental; in this instance, to proscribing conduct which may be validly done.

Appellees here have not sought to enjoin "Hair" from playing in Chattanooga, they have not confiscated any of plaintiff's property: they simply refused to contract with plaintiff because plaintiff's production violates the standard lease agreement. At no time has issue been made, by plaintiff, that the above-mentioned illegal acts are not part of the play (even the original complaint admits to public nudity), and the record is devoid of any offer by plaintiff to produce the play *sans* illegal conduct.

Thus, the defendant's action was not directed at activities falling under the First Amendment, and no prior judicial hearing was necessary for them to simply refuse to contract with the plaintiff.

Finally, even on the assumption that appellant's contention were the state of the law, which is vehemently denied; the error, if any, in the case at bar would be harmless error. *There has been an adversary proceeding* in which the obscenity issues have been decided, and plaintiffs have presumably suffered no more than they would have if the matter had been decided prior to the final denial by the board. In other words, there is no showing that the decision would have been any different at an earlier point in time than it was at the trial which was in fact conducted prior to the last dates requested by the appellant to present the so-called play. There was no illegal search and seizure, nor were there any arrests, and the denial of the contractual right was affirmed after an adversary hearing. Thus,

if there were any error, which is once again denied, it would be harmless error.

POINT IV. The Record Does Support The Findings Of The District Court.

Petitioner herein has completely miscategorized and deleted the pertinent material in its discussion of this issue on pages 43-46 of its brief. Petitioner has failed to mention a single sex act, a plethora of which were proven beyond question and were, in fact, admitted, below, as demonstrated in the statement of facts, supra.

The district court did not, in fact, find the production, as a whole, obscene because, at the time its decision was made, to be considered obscene, a work had to be "utterly" without redeeming social value" with, as the court noted (341 F. Supp. 475) strong emphasis being placed upon the word "utterly." The court stated in this regard:

> ". . . the Court cannot state that as a whole it is 'utterly' without redeeming social value."

What the court did hold, however, was that:

> "This Court is accordingly of the opinion that the theatrical production "Hair" contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the City and of the State of Tennessee. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Tivoli Theater unto the plaintiff."

Clearly, and beyond any reasonable doubt, the record,

as demonstrated in the statement of facts herein, supports such a finding.

In view of *Miller* v. *California,* supra, and the lower courts' reliance on the word "utterly," it may well be that the production would be considered obscene now utilizing current community standards, and given the test that a work must have serious literary, artistic, political, or scientific value.

But, in any event, the case should not be remanded for this determination because the lower courts were correct in holding that there is conduct, apart from speech or symbolic speech, which occurs in violation of valid state laws in "Hair," and it was stipulated that the same stage conduct would occur here as it had elsewhere (App. 31).

Further as to the necessity of the Court seeing the production, petitioner has failed to cite a single case supporting its contention that a judge must see a theatrical production before declaring it obscene. This allegation seems particularly inappropriate in the instant case.

First, it was never alleged before or brought up to the District Court.

Second, appellant, by demanding "immediate" trials both times it came before the District Court, never gave the Court time to see the production. The record reflects that initially defendants and the Court were given only five days' notice before plaintiff had a show cause hearing held; and then after defendants later filed a Motion to Dismiss, part of which was eventually sustained, but while said Motion was pending, plaintiff again came to the Court on March 16, 1972, seeking to have the Court put aside other matters on its docket to give it an expedited hearing so it could put on its production in less than a month, on April 9. Subsequently, on March 23, the Court reserved judgment on the Motion to Dismiss, gave defendant ten

(10) days to answer and set the cause for hearing on the 10th day, April 3, 1972. Defendants filed their answer in just eight (8) days in order to give plaintiff and the Court notice of their defenses as soon as possible rather than wait to the day of trial as they could have done. Obviously, because of plaintiff's own delays, the Judge could not be expected to see the play in the interim.

The rule is that where one side has access to witnesses who possess special knowledge that the other side does not, and refuses to call them, it is presumed that their testimony would be adverse and unfavorable to the party having such access. *Tindell* v. *Bowers,* 31 Tenn. App. 474, 216 S.W. 2d 752; *Mallicoat* v. *Volunteer Finance & Loan Corp.,* 57 Tenn. App. 106, 415 S.W. 2d 347. It is, therefore, submitted that it was up to plaintiff to supply the Court the opportunity to see the play, or at the very least to make a motion to that effect; and having failed to do so, it cannot now be heard to complain.

Respondents agree that the best evidence of the contents of the play would have been a private showing for the Court, *as a part of the proceedings,* but petitioner cannot be heard to now object in view of the fact that it could have produced that evidence while respondents could not. *Transamerica Ins. Co.* v. *Bloomfield,* 401 F. 2d 357 (C. A. Tenn. 1968).

CONCLUSION

It is respectfully submitted that the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

EUGENE N. COLLINS

RANDALL L. NELSON

APPENDIX

Chattanooga Code

Sec. 25-28. *Indecent exposure and conduct.* It shall be unlawful for any person in the city to appear in a public place in a state of nudity, or to bathe in such state in the daytime in the river or any bayou or stream within the city within sight of any street or occupied premises; or to appear in public in an indecent or lewd dress, or to do any lewd, obscene or indecent act in any public place.

Sec. 6-4. *Offensive, indecent entertainment.* It shall be unlawful for any person to hold, conduct or carry on, or to cause or permit to be held, conducted or carried on any motion picture exhibition or entertainment of any sort which is offensive to decency, or which is of an obscene, indecent or immoral nature, or so suggestive as to be offensive to the moral sense, or which is calculated to incite crime or riot.

Tennessee Code Annotated

Sec. 39-3003. It shall be a misdemeanor for any person to knowingly sell, distribute, display, exhibit, possess with intent to sell, distribute, display or exhibit; or to publish, produce, or otherwise create with the intent to sell, distribute, display or exhibit any obscene material . . .

• • •

The word "person" as used in this section shall include the singular and the plural and shall also mean and include any person, firm, corporation, partnership, copartnership, association, or any other organization of any character whatsoever.

Sec. 39-1013. *Sale or loan of material to minor — Indecent exhibits.* — It shall be unlawful:

(a) for any person knowingly to sell or loan for monetary consideration or otherwise exhibit or make available to a minor:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person, or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

(2) any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in paragraph (1) hereof above, or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors;

(b) for any person knowingly to exhibit to a minor for a monetary consideration, or knowingly to sell to a minor an admission ticket or pass or otherwise to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

PUBLIC CHAPTER No. 510

AN ACT ENTITLED: "An Act to repeal Chapter 30 of Title 39, Tennessee Code Annotated, so as to amend and re-write the obscenity law now governed by said Chapter, to re-define obscenity and other terms pertinent to the law of obscenity and to provide civil and criminal procedures and penalties in connection with the control thereof."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That:

SECTION 1. It shall be unlawful for any person or persons to communicate to another or others within this State, by means of telephonic conversation, any lewd, obscene or lascivious remark, suggestion or proposal manifestly intended to embarrass, disturb or annoy the person to whom the said remark, suggestion or proposal is made. It shall also be unlawful for any person or persons to make use of telephone facilities or equipment (1) for an anonymous call or calls, whether or not a conversation ensues, if made or communicated in a manner reasonably to be expected to annoy, abuse, torment, threaten, harass or embarrass one or more persons, or (2) for repeated calls, if such calls are not for a lawful purpose, but are made with intent to abuse, torment, threaten, harass or embarrass one or more persons.

Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof be fined not more than one thousand dollars ($1,000) and in the discretion of the court shall be confined in the county jail or workhouse for some period of time less than one (1) year.

SECTION 2. Definition of terms as used in this Act shall be as follows:

(A) "Obscene" means (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes in a patently offensive way, sexual conduct; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(B) "Prurient interest" means a shameful or morbid interest in sex.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture film, or other pictorial representation, or any statue, figure, device, theatrical production or live performance, or any recording, transcription, or mechanical chemical or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by this Act.

(D) "Person" as used in this Act shall include the singular and the plural and shall mean and include any individual, firm, partnership, co-partnership, association, corporation, or other organization or other legal entity, or any agent or servant thereof.

(E) "Distribute" as used above means to transfer possession of, whether with or without consideration.

(F) "Knowingly" as used above means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(G) "Community" as used above means the State of Tennessee.

(H) "Sexual conduct" as used above shall be construed to mean: (1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. The term "ultimate sexual acts" shall be construed to mean sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy, or (2) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

(I) "Patently offensive" as used above means that which goes substantially beyond customary limits of candor in describing or representing such matters.

SECTION 3. (A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute, any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

(B) Notwithstanding any of the provisions of this Act, the distribution of obscene matter to minors shall be governed by Section 39-1012 et seq., TCA. In case of any conflict between the provisions of this Act and Section 39-1012 et seq., TCA, the provisions of the latter shall prevail as to minors.

(C) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in Section

III (A) with knowledge that a person is a minor under 18 years of age, or while in possession of such facts that he or she should reasonably know that such person is a minor under 18 years of age.

(D) (1) Every person who violates sub-section (A) is punishable by a fine of not less than $250.00 nor more than $5,000, or by confinement in the county jail or workhouse for not more than one year, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of sub-section (A) is punishable as a felony by a fine of not less than $500.00 nor more than $10,000, or by imprisonment in the state penitentiary for a term of not less than two nor more than five years or by both fine and imprisonment.

(2) Every person who violates sub-section (C) is punishable by a fine of not less than $250.00 nor more than $5,000 or by confinement in the county jail or workhouse for not more than one year, or by both fine and confinement. If such person has been previously convicted of a violation of this Act, a violation of sub-section (C) is punishable as a felony and by a fine of not less than $500.00 nor more than $10,000, or by imprisonment in the state penitentiary for a term not less than two years nor more than five years.

(3) Every person who violates sub-section (D) is punishable by a fine of not less than $500.00 nor more than $10,000, or by imprisonment in the state penitentiary for a term not less than one year nor more than five years, or by both such fine and imprisonment.

SECTION 4. No criminal action to enforce the provisions of this Act shall be commenced except upon application of the District Attorney General or his designated representative. Said application shall be made

only with the knowledge of and approval by the District Attorney General. Criminal action shall commence only on issuance of a warrant by a judge of a court of record. No warrant shall issue until the party against whom a warrant is sought is notified of the application for a warrant and given 24 hours to appear and contest the existence of probable cause for the issuance of a warrant. If the defendant fails to appear after notice, the hearing shall be held in his absence.

SECTION 5. Any contract to be performed in whole or in part in this state which requires any person, firm, or corporation to accept, receive, sell, distribute, or purchase any material which is obscene, as defined in Section II, whether as a condition precedent to other contractual arrangements or otherwise, shall be no defense to any criminal, civil, or injunction suit; and such a contract, to the extent that it may require any person, firm, or corporation to accept, receive, sell, distribute, or purchase any material which is obscene, is hereby declared to be against public policy and unenforceable.

SECTION 6. (A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the

State of Tennessee, except that matter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

(B) When a search and seizure takes place in accordance with this Section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one day after the request therefor, or at such time as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jurisdiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken.

(C) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative and in addition to all other lawful means of obtaining evidence as provided by the laws of this state. Nothing contained in this section shall prevent the obtaining of allegedly obscene matter by purchase or under injunction proceedings as authorized by this Act or by any other statute of the State of Tennessee.

SECTION 7. Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney general or any law enforcement agency, to be destroyed, and the court

may cause to be destroyed any such material in its possession or under its control.

SECTION 8. Every person, whether or not he is a citizen of or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of this Act, and the executive authority of this state shall demand extradition of such person from the executive authority of the state or foreign country in which such person is found.

SECTION 9. (A) The circuit, chancery, or criminal courts of this state and the chancellors and judges thereof shall have full power, authority, and jurisdiction, upon application by sworn detailed petition filed by any district attorney general within their respective jurisdictions, to issue any and all proper temporary restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this Act. However, this section shall not be construed to authorize the issuance of ex parte temporary injunctions preventing further regularly scheduled exhibition of motion picture films by commercial theatres, such injunction to issue only upon at least one (1) day's notice, but the court may immediately forbid the removing, destroying, deleting, splicing, amending or otherwise altering the matter alleged to be obscene. The person or persons to be enjoined shall be entitled to trial of the issues within two (2) days after joinder of issue and a decision shall be rendered by the court within two (2) days of the conclusion of the trial. In order to facilitate the introduction

of evidence at any hearing as provided herein, the court is hereby empowered to order defendants named in any proceeding set out herein to produce one copy of the matter alleged to be obscene, along with necessary viewing equipment, in open court at the time of the hearing or at any other time agreed upon by the parties and the court. In proceedings under this section there shall be no right to trial by jury. If the defendant in any suit for injunction filed under the terms of this section shall fail to answer or otherwise join issue within twenty (20) days after the filing of a petition for injunction, the court, on motion of the district attorney general, shall enter a general denial for the defendant, and set a date for hearing on the questions raised in the petition for injunction within ten (10) days following the entry of the denial entered by the court and the court shall render its decision within two days after the conclusion of that hearing.

(B) In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the clerk of the court of the county in which the proceedings were brought any of the obscene matter in his possession and such clerk shall be directed to hold said matter in his possession to be used as evidence in any criminal proceedings in which said matter is in issue but if no indictment is returned concerning said matter within six (6) months of the entry of said final order, the said clerk shall destroy said matter.

(C) The review of any final decree, order or judgment shall be by broad appeal direct to the Supreme Court. Any party, including the district attorney general, shall be entitled to an appeal from an adverse decision of the court.

The granting of an appeal shall have the effect of staying or suspending any order to destroy but not an order to seize such matter, nor shall the granting of an appeal suspend any permanent injunction granted by the trial court.

SECTION 10. Neither the state nor the district attorney general shall be required to file any injunction, cost or appeal bond or to pay any costs or service or process fees in actions filed under this title.

SECTION 11. The provisions of this Act shall take precedence over the Tennessee Rules of Civil Procedure when there is any conflict between said rules and the provisions of this Act.

SECTION 12. The remedies and procedures set out in this Act are supplementary to each other and no remedy shall be construed as excluding or prohibiting the use of any other remedy.

SECTION 13. Except as expressly herein provided, the provisions of this Act shall not be construed as repealing any provisions of any other statute, but shall be supplementary thereto and cumulative thereto.

SECTION 14. Tennessee Code Annotated Sections 39-3001 through 39-3008, as presently written, are hereby repealed in their entirety.

SECTION 15. If any provision, clause, sentence, paragraph, section, phrase or part of this Act, or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect any other provision, clause, sentence, paragraph, section, phrase, part or application of this Act which can be given effect without the invalid provision, clause, sentence, paragraph, section, phrase, part or application. To this end the provisions, clauses, sen-

tences, paragraphs, sections, phrases and parts of this Act are declared to be severable.

SECTION 16. The conducting of the business of selling, displaying, exhibiting or distributing obscene material as defined in this Act and/or engaging in the business of operating an adult peep show house is hereby declared to be against public policy. The provisions of this Act shall not, however, be applicable to a "library" as defined in Section 69-202, Tennessee Code Annotated.

SECTION 17. This Act shall take effect from and after its passage, the public welfare requiring it.

PASSED: March 12, 1974

/s/ JOHN S. WILDER
Speaker of the Senate

/s/ NED R. MANCHESTER
Speaker of the House of Representatives

APPROVED:
Friday, March 15, 1974.

/s/ WINFIELD DUNN
Governor

[redacted]

(Submitted with the consent of the Parties)

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1994

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

[redacted]

Attorney for The Authors League of America, Inc., as amicus curiae

[redacted]

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et al.,

Respondent.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Its members, including the authors of the Musical, HAIR, write the plays and musical comedies which are produced on the New York stage and in major theatres throughout the United States. One of the League's principal purposes is to express the views of its members in cases involving freedom of speech and press, and the freedom of audiences to see plays. The decisions below drastically curtail these freedoms and restrict the rights of dramatists, producers and audiences. Because these decisions pose a grave danger to freedom of speech in the American theatre, the Authors League respectfully submits this brief.

ARGUMENT

Taken as a Whole, HAIR Cannot be Judged Obscene under the Miller v. California Standard.

(i) The District Court recognized that the Chattanooga Municipal Auditorium had banned the presentation of HAIR because its Board thought the musical was obscene. The Court also recognized that if HAIR was not obscene, the banning would violate the Petitioner's First Amendment rights.

As several Federal Courts have ruled, HAIR is not obscene. Taken as a whole: it does not appeal to prurient interest in sex; or portray sexual conduct in a patently offensive way, or lack serious literary and artistic value. Since, taken as a whole, it satisfies any one of the three-part *Miller* v. *California* tests, it is not obscene—and its banning by the Chattanooga Auditorium board must be reversed. (*Miller* v. *California*, 413 U.S. 15)

The courts below sought to side-step this inevitable conclusion of non-obscenity by attempting to separate "conduct" (i.e., the action on the stage) from "speech" (i.e., the words spoken by the actors). Selecting certain pieces of action and stage business, the courts decided that this "conduct" was neither "symbolic speech" nor so closely related to speech as to be illustrative thereof. They concluded that such conduct is not protected by the First Amendment, and can be judged standing alone, rather than as part of the *whole* of the dramatic work. Having wrenched these actions from the context of the play, the Courts ruled they were obscene. Implicit in both opinions is the recognition that if the musical were judged as a

whole under the *Miller* standard, it would have to be judged not obscene.

The "conduct" in a play cannot be separated from its dialogue and relegated to a lower standing. On the stage, action is a primary means of communicating the playwright's ideas, emotions, characterization and development of the plot. Legally and aesthetically, a play's "conduct" is as much "expression" as its dialogue; and pieces of the conduct are no more susceptible than passages of dialogue of being excised from the play and judged separately.

The function of "conduct" as the primary means of dramatic expression was described by Judge Learned Hand in *Sheldon* v. *Metro-Goldwyn Pictures Corporation, et al.*, the classic copyright infringement suit involving the stage play DISHONORED LADY. 81 F. 2d 49 (2d Cir. 1936); cert. denied 298 U.S. 669. Judge Hand said:

> "We have often decided that a play may be pirated without using the dialogue. . . . Were it not so, there could be no piracy of a pantomine, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama." (p. 55)

Judge Hand continued:

> "Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause may tell the audience more than words could tell. (p. 55)

Judge Hand emphasized that:

> "The play is the sequence of the confluents of all these means, bound together in an inseparable unity. . . ." (pp. 55-6)

We submit that "conduct" from HAIR, part of the "indivisible unity" of the musical and a fundamental means of its expression, cannot be judged separately. As explicated in *Miller*, the First Amendment requires that only the work as a whole, as an "inseparable unity", be judged for alleged "obscenity".

(ii) We need not belabor the point that plays and musicals are entitled to full protection under the First Amendment. Motion pictures are so protected, although hardly envisioned by Madison and his fellow draftsmen. But they were familiar with the stage and with the evils of censorship in this fundamental medium of expression.*

(iii) The conduct which the lower courts improperly tore from the musical for separate judgment primarily involved what the trial judge considered "*simulated* sexual conduct". (emphasis added). He equated this with the commission of an *actual* murder or other crime on the stage, as part of the play. But when Othello realistically *simulates* the strangling of Desdemona, on the stage of the Chattanooga auditorium, he cannot be convicted of murder, attempted murder or

* "In 1737, Henry Fielding, the greatest practicing dramatist, with the single exception of Shakespear, produced by England between the Middle Ages and the nineteenth century, devoted his genius to the task of exposing and destroying parliamentary corruption, then at its height. Walpole, unable to govern without corruption, promptly gagged the stage by a censorship which is at full force at the present moment." Bernard Shaw, Preface to PLAYS UNPLEASANT, Penguin Books, 1961; p. 14.

assault and battery. If a character *simulates* a sexual act on the stage, he is not guilty of violating statutes prohibiting *actual* sexual conduct in public. His conduct is as much dramatic "expression" as Othello's simulated act of murder, or any of the innumerable crimes of violence simulated on the stage in plays, musicals and operas.

(iv) As dissenting Judge Edwards noted, neither the trial judge, nor the advisory jury, nor the majority of the Court of Appeals saw the musical HAIR. It was therefore impossible for them to judge the play, including the conduct singled out by them, under constitutional standards. This Court held in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, that expert testimony was not required of the prosecution, because the challenged works "obviously, are the best evidence of what they represent." A second-hand account of what an inexpert witness saw on the stage did not give the jury, trial judge or appellate judges sufficient basis for determining whether the "inseparable unity", the musical HAIR, actually did appeal to prurient interest, depict sexual conduct in a patently offensive way or lack serious value.

(v) Municipal auditoriums are a primary forum for the professional theatre in many cities of this country. It is therefore essential that their managers comply scrupulously with constitutionally acceptable standards in determining which plays shall or shall not be permitted access to audiences in these cities. We agree with plaintiff that "narrow, objective and definite standards" were not established or followed here. Without such standards, American playwrights and their audiences would suffer, in these cities, the same stifling censorship which afflicted the British theatre for over two hundred years.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae.
234 West 44th Street
New York, New York 10036

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT WITH BRIEF ANNEXED

Charles H. Keating, Jr.
18th Floor, Provident Tower
One East Fourth Street
Cincinnati, Ohio, 45202

Amicus Curiae

Richard M. Bertsch
James J. Clancy
Ray T. Dreher
Albert S. Johnston, III
440 Leader Bldg.
Cleveland, Ohio, 44114
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT WITH BRIEF ANNEXED

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(2) of the Rules of the U. S. Supreme Court, for leave to file a tardy Brief Amicus Curiae in support of the Respondents, Steve Conrad, et al.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation: First, as the founder and co-

counsel for Citizens for Decent Literature, Inc. (now Citizens for Decency Through Law) and more recently as a member of the Presidential Commission on Obscenity and Pornography.

The importance of this case lies in the fact that this Court has been presented with an opportunity to come to grips with the issue of whether, in applying *prospective civil sanctions* to lewd *conduct* (not pure speech) on films or in a stage play, the government is restricted to applying the formulistic test fashioned by this Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d, 419, 93 S. Ct. 207 (June 21, 1973) – a test which was arrived at in the background of arguments which focused on the application of *criminal* sanctions for *past* conduct. In a Brief Amicus Curiae filed with this Court last term in *Jenkins v. Georgia*, No. 73-557, (which reviewed criminal, rather than civil, sanctions) Moving Party argued that a state's power to apply *civil* sanctions *prospectively* to lewd *conduct* on films or in stage plays is not so limited. See Brief Amicus Curiae of C. H. Keating, Jr., in Support of Appellee in *Jenkins v. Georgia*, No. 73-557, at pp. 33-39, a copy of which appears at Appendix "A" to the Brief herein.

Moving Party urges this Court to permit Federal District Judge Frank W. Wilson's opinion and judgment herein to function as a vehicle for formulating a rule of constitutional law which will permit state legislators, law enforcement personnel, and the judiciary to enact and enforce *civil* statutes, city ordinances and judicial decisions which *enjoin prospectively*, as *malum in se*, the public display of explicit sexual conduct (including public nudity) on the stage and motion picture screen, and without reference to the "taken as a whole" test, fashioned by this Court in *Miller v. California*, *supra*, upon the condition enunciated by Judge Wilson; that is, whenever it is shown as a condition precedent to the application of such "conduct" laws in specific cases that the four conditions stated in *U.S. v. O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, (May 27, 1968) are satisfied, namely:

(1) The statute or ordinance is within the Constitutional Power of Government;

(2) The statute or ordinance furthers an important interest;

(3) The governmental interest which is being furthered by the statute is unrelated to the suppression of free speech, and

(4) The incidental restriction must be no greater than is essential to the furtherance of that governmental interest.

Under this view of the law, Respondents, Conrad et al., acted lawfully in refusing use of the City facilities: (1) The ordinance and statutes forbidding public nudity and lewd conduct are clearly within the City's police power; (2) such ordinances and statutes were in furtherance of the historical common law right of a local community to prevent the unlawful exhibition of the sexual organs and the sex act in public; (3) the City's refusal was in no way related to the suppression of "Hair" as a vehicle for speech, and (4) the refusal permitted the same to be shown elsewhere and it was not unreasonable to expect that City property could be used, provided the unlawful sexual displays were omitted. See *P.B.I.C. Inc. et. al. v. Dist. Atty. of Suffolk County* 258 NE2, 82 (April 9, 1970)

Moving Party further urges this Court to require that, in in attempting to state a federal cause of action under 42 U.S.C., Section 1983 in such cases,[1] the complainant must allege affirmatively both: (1) the fact that the prosecutor threatens to apply the lewd conduct statute independently and in derogation of the "taken as a whole" test established in *Miller v. California, supra*, and also (2) the specific facts which preclude the prosecutor from applying the law expressed in *U.S. v. O'Brien, supra*. Having failed in this regard, the trial court should have granted a dismissal of the case on the grounds of failure to state a claim upon which relief can be granted.

Moving Party submits that a recognition of this differentiation between *criminal sanctions* for *past conduct*, and *civil*

[1] Assuming that in such a cause as the matter herein, a federal cause of action may be stated under 42 U.S.C. Sec. 1983 for action taken "under color of state law", without also pleading "racial bias or invidious discriminatory animus." See page 35, infra.

sanctions which operate *prospectively*, is indispensible to a resolution of the basic problem which underlies this action, and arguments thereon will be of assistance to the members of this Court. Accordingly, Moving Party respectfully requests permission to file the Brief Amicus Curiae annexed hereto, which presents such arguments in the context of the historical facts of this case.

Dated: October 16, 1974.

Charles H. Keating, Jr.
Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et al.,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF CHARLES H. KEATING, JR. IN SUPPORT OF RESPONDENT

JURISDICTION

The jurisdiction of the United States District Court is predicated upon Title 42 U.S.C. section 1983. The jurisdiction of the Supreme Court to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit is conferred by Title 28 U.S.C. section 1254.

QUESTIONS PRESENTED

Amicus Curiae would urge this Court to consider the following Question on review, as being a "subsidiary question fairly comprised" within the questions presented in the original petition for certiorari. Rule 23(1) (c) of the Rules of the United States.

1. Whether the Common Law Power of Local Municipal Governments To Declare What Constitutes "Lewd Conduct In Public", And To Abate The Same (Reserved To The People By The Ninth and Tenth Amendment As A "Municipal Affair") Became Subservient To The First Amendment After Adoption of The Fourteenth Amendment in 1868.

Statement of the Case

A. Introduction.

As averred by Petitioner Southeastern Promotions, Ltd., the stageplay "Hair" is a well-known production, having commenced its run off Broadway in New York City in early 1968. (Appendix p.10) In point of time reference, this Court had just handed down a series of no-clear majority reversals in *Redrup v. New York et al.*, 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414 (May 8, 1967). Those decisions catapulted the three-stage no-clear majority test in *Memoirs v. Massachusetts*, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975 (Mar. 21, 1966) into national prominence and threw the legal advisors to law enforcement into a quandary. They reasoned thusly: How could one establish that anything, much less "Hair", was utterly without redeeming social importance, when taken as a whole?[2] Cf. *Miller v. Calif.*, 413 U.S. 15, 37 L.Ed.2d 419,

[2] The lewd conduct which was interwoven into "Hair" in 1967 was the direct result of this Court's decisions in Memoirs v. Massachusetts, supra (Mar. 21, 1966) and Redrup v. N.Y., supra (May 8, 1967). Those decisions have made the "temptation to substitute the latter commodity (vulgarity, nudity and obscenity) for the former talents (musical, literary, and dramatic ability) well-nigh irresistible in the entertainment world in recent years." (See Trial Judge Wilson's opinion in 341 F.Supp. 465, at 477.) Unless this Court does something positive to correct this erroneous impression, the temptation to "combine talent with vulgarity, nudity and obscenity to come up with a box office hit" will continue unabated.

429 fn.3, 93 S.Ct. 207 (June 21, 1974.) In the shadow of this utter confusion, "Hair" marched across the U.S. from New York to San Francisco, Los Angeles, Chicago, Las Vegas and a host of other cities without opposition. The only serious legal challenge in this advance was made in Boston, Massachusetts by Garrett Byrne, the District Attorney of Suffolk County. The Suffolk County District Attorney's determined legal attack was doomed at the outset by the fractured condition of this Court and the refusal of a majority of its members to come to grip with this modern challenge to public morals.

B. **The Massachusetts "Hair" Litigation - Three Years On This Court's Docket Without Decision.**

To view the appeal herein in its proper perspective, and understand the dilemma which faced the Respondent Board of the City of Chattanooga, this Court must refresh its recollection as to the nature of the Massachusetts litigation and the four years of frustrating federal interference in which District Attorney Byrne found himself involved, in a similar case in Boston, Massachusetts, notwithstanding a prompt resolution of the "Hair" problem in his favor by the highest court in his own state. The facts of the Massachusetts case, which appear below, are documented in the April 9, 1970 opinion of the Supreme Judicial Court of Massachusetts in *P.B.I.C., Inc. v. District Attorney of Suffolk County*, 258 N.E. 2d 82, a copy of which appears at Appendix B to this Brief. See also the case as reported in the Appendix to *P.B.I.C., Inc. v. Byrne*, 313 F.Supp. 775 at 768.

1. The "Solomonic" Decision of The Supreme Judicial Court of Massachusetts.

On Feb. 22, 1970, "Hair" opened at the Wilbur Theater in Boston. A few days later, the District Attorney of Suffolk County gave notice that the performers and the producers would be prosecuted under Sections 16 and 32 of Chapter 272 of the Massachusetts General Laws, (which made it a crime to be guilty of "open and gross lewdness and lascivious behaviour" and to "participate in any lewd, obscene . . . show or entertainment,") if they failed to remove from the play certain lewd conduct. The producers of "Hair" immediately sought injunctive and declaratory relief from a single justice of the Massachusetts Supreme Judicial Court. Thereafter, evidence was taken and the case was reserved to the full court. After each participating justice had observed the Boston production as a member of the regular nightly audience, the Court unanimously held in *P.B.I.C. Inc. Byrne, supra:*

> "One scene shows members of the cast in the nude facing the audience. One nude male performer is bathed on stage. There is incidental stage action which a jury could conclude was clowning intended to simulate sexual intercourse or deviation . . . . The incidents already mentioned are separable from, and wholly unnecessary to, whatever theme this noisy, disorganized performance may have . . . . Injunctive relief will be given, but by analogy to the principle that he who seeks equity must do equity, the injunction, to be framed in the county court, shall be conditional upon excision forthwith of the specified lewd features so as:
>
> > (a) to have each member of the cast clothed to a reasonable extent at all times, and (b) to eliminate completely all simulation of sexual intercourse or deviation. Nothing in this opinion or any injunction is to preclude prosecution for any misuse of the national flag, a matter not argued to us . . . ." (313 F. Supp. 768).

Following this decision by the Highest Court in Massachusetts, District Attorney Byrne indicated he would prosecute under section 16 and the common law of indecent exposure if the cast did not comply with the Massachusetts' High Court's conditions. On April 10, 1970, the cast and producers chose to close the show rather than make the modifications indicated by the Court's opinion or risk criminal prosecution by continuing to present the production without modification. Three days later the producers of the play filed an action in the federal district court seeking relief under the Civil Rights Act of 1871 (42 U.S.C. section 1983).

2. "Hair" 's use of a three-Judge Federal District Court in Massachusetts to upset the Solomonic Solution of Massachusetts' Highest Court.

In *P.B.I.C. Inc. v. Byrne*, 313 F. Supp. 757 (May 6, 1970), a three-judge federal district Court in the district of Massachusetts (Justices Coffin and Bownes, with Garrity dissenting) granted the relief requested and enjoined the District Attorney from prosecuting "Hair" under either section 16 or the Common law of indecent exposure. In its ruling, the federal district held at p. 763:

> "We conclude that this same 'obscenity' standard also applies to the regulation of live theater productions . . . ." and at page 765:
>
> "We conclude that Massachusetts' 'lewd and lascivious' proscription cannot be given a constitutionally permissible interpretation in the live theater context while retaining its much broader proscription for non-speech forms of lewd conduct, without running afoul of the constitutional requirement that limitations on speech related activities must be narrowly drawn so as not to chill legitimate expression. *Zwickler v. Koota*, 389 U.S. 241, 250, 88 S.Ct. 391, 19 L.Ed. 2d 414, (1967) and cases cited . . ."

3. The Indecision of This Court - The Massachusetts "Hair" Litigation Was On This Court's Docket For Three Years Without Decision.

On May 6, 1970, Suffolk County District Attorney Byrne sought a stay of execution in this Court which was granted and, on May 14th, the stay was extended through May 22, 1970. *Garrett H. Byrne v. P.B.I.C. Inc. et al.*, 397 U.S. 1082, 26 L.Ed.2d 59, 90 S.Ct. 1684 (May 14, 1970.) On May 22, 1970, the application for a stay was denied by an equally divided Court with Justices Burger, Black, Harlan, and Stewart voting to grant the stay, and Justices Douglas, Brennan, Marshall, and White voting to deny the stay. *Garrett H. Byrne v. P.B.I.C. Inc. et al.*, 398 U.S. 916, 26 L.Ed.2d 82, 90 S.Ct. 1718 (May 22, 1970.)

On Aug. 1, 1970, Massachusetts Attorney General Quinn filed a direct appeal with this Court from the judgment of the three-Judge Federal District Court in *Byrne v. P.B.I.C., Inc.*, October Term 1970, No. 484. On March 29, 1971, following its decisions on federal interference in *Younger v. Harris et al.*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (Feb. 23, 1971), this Court vacated the judgment of the three-Judge Federal District Court and remanded the case of the United States District Court for the District of Massachusetts to consider the question of mootness. *Byrne v. P.B.I.C., Inc.* 401 U.S. 987, 28 L.Ed.2d 526, 91 S.Ct. 1222 (March 29, 1971.)

This Court's remand on March 29, 1971, did not end the determination of the Attorney General of Massachusetts to seek a resolution of this basic legal question. On Aug. 30, 1971, the same case reappeared on the U.S. Supreme Court docket with the filing of a second appeal in *Byrne v. P.B.I.C., Inc.*, Oct. Term 1971, No. 71-304. That case was to remain unresolved on this Court's docket for almost two years. Finally, on June 25, 1973, following this Court's decisions in *Miller v. California et al.*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, the federal district court judgment was again vacated and remanded to the United States District Court for the District of Massachusetts for further reconsideration in light of *Miller v. California! Garrett H. Byrne v. P.B.I.C. Inc. et al.*, 413 U.S. 905, 37 L.Ed.2d 1017, 93 S.Ct. 3031 (June 25, 1973.)

C. "Hair" 's Use of the Federal Courts in the South To Compel The Use of Municipal Facilities.

During the years 1970 through 1972, the road companies of "Hair" sought to play in various cities throughout the South. It was the pattern of the producers to demand use of the municipal facilities and, upon their denial, immediately seek a preliminary show cause hearing in the federal district court, at which they would seek immediate relief and the use of the facilities on the dates desired. *In none of these cases did they ask the state courts for relief.* Southeastern Promotions Ltd. v. City of Charlotte, N.C. 333 F.Supp. 345 (Nov. 8, 1971); *Southeastern Promotions Ltd. v. Atlanta*, 334 F. Supp. 634 (Nov. 8, 1971); *Southeastern Promotions Ltd. v. City of Birmingham* (D.C.N.Ala.) CA No. 71-1158; *Southwest Productions Inc. v. Freeman* (D.C.Ark. 1971) (Little Rock, Ark.). This strategy had the dual result of publicizing their production for them in local newspapers as well as severely restricting the time and manner local municipal attorneys had to prepare their cases. On those occasions where the local governments were successful in the district courts, appeals were immediately taken and expedited hearings sought and granted in the appellate courts. *Southeastern Promotions Ltd. v. Mobile, Alabama*, 457 F.2d 340 (5th Cir.) (Feb. 28, 1972); *Southeastern Promotions Ltd. v. City of West Palm Beach*, 457 F.2d 1016 (5th Cir.) (Mar. 22, 1972); *Southeastern Promotions Ltd. v. Oklahoma City, Oklahoma*, 459 F.2d 282 (10th Cir.) (April 13, 1972.)

STATEMENT OF FACTS

A. City Refuses to Book "Hair" in Chattanooga Municipal Facilities.

The Board of Directors of the Memorial Auditorium were contacted by an agent of the petitioner on September 11, 1970 with the request of the petitioner to present the musical stage play "Hair" in the Tivoli Theatre at some subsequent time and said request was denied by the members of

the Board. On April 2, 1971, an agent of the petitioner again contacted the members of the aforesaid Board to present the aforesaid musical stage play in the Tivoli Theatre and said Board once again rejected petitioner's request. On October 29, 1971, at the regular monthly meeting of the Board of Directors of Memorial Auditorium, petitioner once again requested said Board to be allowed the right to present the musical stage play "Hair" in the Tivoli Theatre during the period November 23, 1971 through November 28, 1971, having ascertained beforehand from Clyde Hawkins, the manager of the Tivoli Theatre that the aforesaid dates were available. Respondents in their capacity as Board of Directors of the Memorial Auditorium rejected petitioner's request and indicated that *under no circumstances would they voluntarily contract with the petitioner to present the musical stage play "Hair" in the Tivoli Theatre.* (Appendix at page 8).

B. Preliminary Proceedings In The United States Federal District Court.

Petitioner herein brought this action in the District Court November 1, 1971, alleging that two days previously, on October 29, 1971, it had requested of respondents the right to present the stage production "Hair" during the period of November 23, 1971, through November 28, 1971 (less than one month from the desired date) and that the request was denied. The action was filed three weeks and one day before the desired dates. The prayer of the original complaint, sought a declaration that "Hair": 1) was an expression protected by the First and Fourteenth Amendments to the Constitution of the United States and, 2) did not violate any city ordinance, nor was it subject to the definitions given to the term "obscenity." The prayer also sought a permanent injunction enjoining the respondents: 1) mandatorily to reserve the Tivoli Theatre for Petitioner's use or, 2) to contract with the petitioner for the use of the Tivoli Theatre facilities during the period November 23, 1971 through November 28, 1971, and, 3) from interfering with, harassing, or obstructing in any manner whatever the stage production of "Hair."

A show cause hearing was held on November 4, 1971, at which respondents raised the issue that the production would violate the terms of the standard lease agreement as to which petitioner was seeking specific performance, because acts are performed in the production which violate the provisions of laws of the State and City, in direct contravention of the terms of the lease. (Exhibit 3 and Appendix p. 28) reading:

> "This agreement is made and entered into upon the following expressed covenants and conditions, all and everyone of which the lessee hereby covenants and agrees to with the lessor to keep and perform; that said lessee will comply with all laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga and all rules and requirements of the Police and Fire Departments or other municipal authorities of the City of Chattanooga."

Respondents further argued that "due process" afforded them the right to prepare a defense and that final relief should therefore not be granted in view of the petitioner's delay in seeking the dates. The cause was taken under advisement on November 4, 1971, and the preliminary relief was denied on November 8, 1971.

On November 22, 1971, respondents filed a motion to dismiss (Appendix p. 15, 16) averring, *inter alia:* (1) that the complaint failed to state a cause of action in that the petitioner had no right to contract with respondents because the complaint averred acts would occur which would violate Section 25-28 and 6-4 of Part II of the Code of the City of Chattanooga and the common law of Tennessee on indecent exposure, and that said acts would thereby be a violation of the terms of the standard lease sought; and (2) that the complaint failed to state a substantial federal question or constitutional issue. The motion to dismiss was taken under advisement by the Court.

On March 16, 1972, Petitioners moved the Court for leave to file an Amended Complaint, motion for temporary restraining order, and application for an expedited hearing. In the Amended Complaint, a booking date of April 9, 1972, was sought at the Memorial Auditorium. On March 23, 1972,

federal district Judge Wilson entered an order allowing petitioner's motion to amend, reserving action on respondent's motion to dismiss and set the matter for jury trial on April 3, 1972, on the issues of fact in regard to obscenity.

Defendants' answer was filed March 31, 1972, (Appendix p. 17-21) and while relying on the motion to dismiss, it further averred, *inter alia*, (1) violations of the obscenity laws of the City and State would occur if plaintiffs were successful; (2) that no First Amendment rights were involved because the First Amendment does not protect conduct which is contrary to a valid State law upholding a substantial State interest; and (3) that the First Amendment does not protect obscene language or conduct such as that plaintiff sought to exhibit to the public.

C. The Trial Before An Advisory Jury.

The cause came on to be heard to a jury on April 3, 1972, and the Respondent Board, having the burden of proof commenced presentation of its proof. Respondent's proof was completed on April 4, 1972, whereupon Petitioner moved to disallow respondent's claim of obscenity and said motion was overruled. Petitioner presented its proof and the Court, after hearing further arguments on a renewed motion to disallow the claim of obscenity, took the motion under submission.

The evidence upon the trial of the obscenity issue consisted of the full script and libretto with the production notes and stage instructions (Exhibit No. 4), a recording of the sound tract of all musical numbers in the production (Exhibit No. 7), and a souvenir program (Exhibit No. 1). In addition, there was received the testimony of seven witnesses who had witnessed the production "Hair," including two witnesses who attended a performance two days previous to their testimony, and an eighth witness who had not seen the production but had read the script and gave his interpretation as a drama critic.

On April 5, 1972, petitioner's motion to disallow the claim of obscenity was overruled and the case was submitted to an advisory jury upon two issues: (1) whether or not the

production "Hair" was obscene within the definition of obscenity as it relates to freedom of speech under the First Amendment, and (2) whether or not the conduct in the production "Hair", apart from speech or symbolic speech, was obscene within the definition of obscenity as it relates to conduct.

On April 5, 1974, the jury returned the following verdict:

"(1) We, the jury, find the theatrical production 'Hair' to be obscene in accordance with the definition of obscene as it relates to freedom of speech under the First Amendment of the United States Constitution.

"(2) We, the jury, find the theatrical production 'Hair' to be obscene in accordance with the definition of obscenity as it relates to conduct . . . ."

After discharge of the jury, the Trial Court took further evidence on the action of the Board in denying a lease of its facilities to the petitioner and the standard form of lease required to be executed by all lessees (Exhibit No. 3). Following argument, the case was taken under advisement.

D. The Findings of Fact of Trial Judge Frank W. Wilson.

On April 7, 1972, U.S. District Judge Frank W. Wilson filed a memorandum opinion in which he made the following Findings of Fact:

FINDINGS OF FACT

Turning first to the issue of obscenity, the script libretto, stage instructions, musical renditions, and the testimony of the witnesses reflect the following relevant matters (It should be noted that the script, libretto, and stage instructions do not include but a small portion of the conduct hereinafter described as occurring in the play):

The souvenir program as formerly distributed in the lobby (Exhibit No. 1) identified the performers by picture and biographical information, one female performer identifying herself as follows:

FINDINGS OF FACT

"Hobbies are picking my nose, fucking, smoking dope, astro projection. All that I am or ever hope to be, I owe to my mother."

It was testified that distribution of this program had now been discontinued. Prior to the opening of the play, and to the accompaniment of music appropriate to the occasion, a "tribe" of New York "street people" start gathering for the commencement of the performance. In view of the audience the performers station themselves in various places, some mingling with the audience, with a female performer taking a seated position on center stage with her legs spread wide to expose to the audience her genital area, which is covered with the design of a cherry. Thus the stage is set for all that follows. The performance then begins to the words and music of the song "Aquarius," the melody of which, if not the words, have become nationally, if not internationally, popular, according to the evidence. The theme of the song is the coming of a new age, the age of love, the age of "Aquarius." Following this one of the street people, Burger, introduces himself by various prefixes to his name, including "Up Your Burger," accompanied by an anal finger gesture and "Pittsburger," accompanied by an under arm gesture. He then removes his pants and dressed only in jockey shorts identifies his genitals by the line, "What is this God-damned thing? 3000 pounds of Navajo jewelry? Ha! Ha! Ha!" Throwing his pants into the audience he then proceeds to mingle with the audience and, selecting a female viewer, exclaims, "I'll bet you're scared shitless."

Burger then sings a song, "Looking For My Donna," and the tribe chants a list of drugs beginning with "hashish" and ending with "Methadrine, Sex, You, WOW!" (Exhibit No. 4, p. 1-5). Another male character then sings the lyric.

"SODOMY, FELLATIO, CUNNILINGUS, PED-

FINDINGS OF FACT

ERASTY – FATHER, WHO DO THESE WORDS SOUND SO NASTY? MASTURBATION CAN BE FUN, JOIN THE HOLY ORGY, KAMA SUTRA, EVERYONE." (Exhibit No. 4, p.1-5)

The play then continues with action, songs, chants, and dialogue making reference by isolated words, broken sentences, rhyme, and rapid changes to such diverse subjects as love, peace, freedom, war, racism, air pollution, parents, the draft, hair, the the flag, drugs, and sex. The story line gradually centers upon the character Claude and his response and the response of the tribe to his having received a draft notice. When others suggest he burn his draft card, he can only bring himself to urinate upon it. The first act ends when all performers, male and female, appear nude upon the stage, the nude scene being had without dialogue and without reference to dialogue. It is also without mention in the script. Actors simulating police then appear in the audience and announce that they are under arrest for watching this "lewd, obscene show."

The second act continues with song and dialogue to develop the story of Claude's draft status, with reference interspersed to such diverse topics as interracial love, a drug "trip," impersonation of various figures from American history,[2] religion, war, and sex. The play ends with Claude's death as a result of the draft and the street people singing the song, "Let the Sunshine In," a song the testimony reflects has likewise become popular over the Nation.

Interspersed throughout the play, as reflected in

[2]Lincoln is regaled with the following lyrics: "I'm free now thanks to you. Massa Lincoln, emancipator of the slave, yeah, yeah, yeah! Emanci-mother fucking-pater of the slave, yeah, yeah, yeah! Emanci-mother fucking-pater of the slave, yeah, yeah, yeah! " With Lincoln responding, "Dang my ass . . . . I ain't dying for no white man!"

FINDINGS OF FACT

the script, is such "street language" as "ass" (Exhibit No. 4, pp. 1-20, 21 and 2-16), "fart" (Exhibit No. 4, p. 1-26), and repeated use of the words "fuck"[3] and the four letter word for excretion (Exhibit No. 4, pp. 1-7, 9 and 41). In addition, similar language and posters containing such language were used on stage but not reflected in the script.

Also, throughout the play, and not reflected in the script, are repeated acts of simulated sexual intercourse. These were testified to by every witness who had seen the play. They are often unrelated to any dialogue and accordingly could not be placed with accuracy in the script. The overwhelming evidence reflects that simulated acts of anal intercourse, frontal intercourse, heterosexual intercourse, homosexual intercourse, and group intercourse are committed throughout the play, often without reference to any dialogue, song, or story line in the play. Such acts are committed both standing up and lying down, accompanied by all the bodily movements included in such acts, all the while the actors and actresses are in close bodily contact. At one point the character Burger performs a full and complete simulation of masturbation while using a red microphone placed in his crotch to simulate his genitals. The evidence again reflects that this is unrelated to any dialogue then occurring in the play. The evidence further reflects

[3]A woman taking her departure says to the tribe, "Fuck off, kids." (Exhibit No. 4, p. 1-35). The following dialogue occurs as Claude nears his death scene:
"Burger: I hate the fucking world, don't you?
"Claude: I hate the fucking world, I hate the fucking winter, I hate these fucking streets.
"Burger: I wish the fuck it would snow at least.
"Claude: Yeah, I wish the fuck it would snow at least.
"Burger: Yeah, I wish the fuck it would.
"Claude: Oh, fuck!
"Burger: Oh, fucky, fuck, fuck!" (Exhibit No. 4, p.2-22)

FINDINGS OF FACT

that repeated acts of taking hold of other actors' genitals occur, again without reference to the dialogue. While three female actresses sing a song regarding interracial love, three male actors lie on the floor immediately below them repeatedly thrusting their genitals at the singers. At another point in the script (Exhibit No. 4, p. 2-22) the actor Claude pretends to have lost his penis. The action accompanying this line is to search for it in the mouths of other actors and actresses.

In support of the non-obscenity of the play "Hair" the plaintiff relies upon the contention that the simulated sexual acts consume only a small portion of the total performance time, that the nudity scene is brief and in reduced lighting, that the audience by attending consents to the play, that the play has been a financial success second only to the musical "Oklahoma," that the play has been performed in over 140 cities, that the music from the play has been upon the "Hit Parade," and that four other courts have found the play not to be obscene. *Southeastern Promotions, Ltd. v. City of Atlanta, D.C.* 334 F. Supp. 634 (1971); *Southeastern Promotions, Ltd. v. City of Charlotte, D.C.* 333 F. Supp. 345 (1971); *P.B.I.C., Inc. v. Byrne, D.C.*, 313 F. Supp. 757 (1970); and *Southwest Productions, Inc. v. Freeman*, (U.S.D.C., E.D. Ark., 1971).[4]

[4]This Court has no knowledge of the facts before the courts in any of the cited cases, for they make little in the way of findings of fact. Furthermore, it is apparent from the evidence in this case that the manner of presentation of "Hair" is substantially modified from time to time and place to place. The version of the play upon which the findings of fact have been made by this Court was that presented two days before the trial and five days before the writing of this opinion.

In his memorandum opinion, Judge Wilson declined to follow the rule of law applied by Judge Edenfield in *Southeastern Promotions, Ltd. v. City of Atlanta*, 334 F. Supp. 634 (which held that a stage production cannot be disected into speech and non-speech components) and ruled that "when viewed in their component parts, it was perfectly clear that the actors and actresses in 'Hair' by their conduct, and apart from any element of speech, committed repeated acts of criminal obscenity that would be in violation of the ordinances of the City of Chattanooga and the statutes of the State of Tennessee forbidding acts of obscenity in public places." He further held that the relative brevity of the sexual conduct in proportion to the total time of the play and the reduced lighting constituted no defense; that simulated sexual acts are in themselves sexual conduct; that performance before a consenting audience was no defense; that the city ordinances and state statutes making obscenity a crime were a traditional application of the police power to a municipal affair and were constitutional; and that the obscenity laws relied upon in the premises met the standards laid down in *U.S. v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (May 27, 1968). In concluding, he noted that musical, literary and dramatic talent are scarce commodities, that vulgarity, nudity and obscenity are abundant and readily available and that the temptation to substitute the latter commodities for the former talents has become well nigh irresistible in the entertainment world in recent years; that "Hair" found musical talent and combined it with vulgarity, nudity, and obscenity to come up with a box office hit.

In his judgment entered on April 7, 1972, Federal District Judge Wilson ordered as follows:

> "For the reasons set forth in the memorandum of the Court, the Court is of the opinion that the defendants acted within their lawful discretion in declining to lease the Municipal Auditorium and/or the Tivoli Theater unto the plaintiff."

On April 7, 1972, Judge Wilson denied Petitioner's motion for an injunction pending appeal.

E. Proceedings in the United States Court of Appeals for the Sixth Circuit.

On appeal to the United States Court of Appeals for the Sixth Circuit the judgment was affirmed on the opinion of the trial judge. *Southeastern Promotions, Ltd. v. Conrad*, 486 F.2d 894 (May 30, 1973). Justices O'Sullivan and Weick, with McCree dissenting) the judgment was affirmed

Weick, with McCree dissenting). In additional remarks in which Judge Weick concurred, Judge O'Sullivan also held "Hair" itself to be obscene, stating:

> "Whether the play is considered separately as to its speech and its conduct, or they are joined, it is obscene . . . . ." 486 F.2d at 897.

In a separate opinion, Judge Weick also stated:

> "We do not consider here the right of a person to exhibit such a film on his own property or on property which he has rented. Our case involves only the question whether a federal court has any right to order the state to permit the exhibition for profit of filthy, obscene, sexual material on state property. Federal Courts ought not take over the operation of state facilities . . . . ." 486 F2d at 898.
>
> "No one has a constitutional right to exhibit obscene, sexual acts in public buildings. . . ." 486 F.2d at 899.

A Suggestion for Rehearing en banc was denied (7-2) on October 30, 1973, with a majority of the active judges of the Court voting against such rehearing en banc, and with Circuit Judges Edwards and McCree dissenting. The petition for rehearing was also denied with Circuit Judge McCree dissenting.

In a dissenting opinion from the denial of the rehearing en banc Circuit Judges Edwards and McCree took note of this Court's ruling in *Miller v. California, supra*, and stated:

> "While I would agree that at least some of the acts described so vividly in the opinions of the District Court *(Southeastern Promotions, Ltd. v. Conrad et al.*, 341 F.

Supp. 465 (E.D. Tenn. 1972) and of this court *(Southeastern Promotions, Ltd. v. Conrad et al.*,486 F.2d 894 (6th Cir. 1973) could, if viewed separately, appropriately be labelled obscene under the present standards of the United States Supreme Court (see *Miller v. California, supra,* U.S. at , 93 S.Ct. at 2615.) I do not agree that the play may be judged obscene, unless it is 'taken as a whole' for purposes of that judgment. Thus far we have signally failed to do this. Taking words and sentences out of context, taking gestures employed in a play without reference to the rest of the play as has been done herein does not comply with the standard set out in *Miller, supra,* and *Roth, supra."*

Those judges also thought that the standards employed by the Municipal Board in rejecting the application for rental at the theater were clearly unconstitutionally vague. In a footnote, such standards were characterized by those justices as "clean and healthful and culturally uplifting." The Edwards-McCree dissent also asserted:

"Unless the Supreme Court grants certiorari, this case will represent a final adjudication that the play 'Hair' is obscene and subject to being banned under state obscenity laws in Michigan, Ohio, Kentucky and Tennessee. . . . . "

In replying to the latter claim, Circuit Judge Weick wrote a separate reply (with Judge O'Sullivan concurring) stating:

"We respectfully disagree. The procedural setting of this litigation makes clear the invalidity of such observation, as well as the inapplicability of the authorities cited in the dissent."

In his opinion Judge Weick noted that the case was one for equitable relief and that "a court of equity cannot be faulted for withholding its writ whereby to command the Directors of the Auditorium to allow exhibition therein of a production containing the language and conduct set out in the District Judge's opinion." Judge Weick also noted that, "it was not improper for the District Judge to consider whether the play was obscene before determining whether or not to order the Directors of the Auditorium to allow its exhibition in Chattanooga . . . . "

On December 26, 1972, Petitioner filed a petition for a writ of certiorari with this Court and on February 19, 1974, the writ was granted.

SUMMARY OF ARGUMENT

The gist of Southeastern's alleged federal cause of action is a claim in contract for specific performance, based upon an alleged federal "civil right" arising out of a First Amendment right to "free speech." In its complaint, petitioner admitted that nude *conduct* is present in the production of "Hair" and affirmatively pleaded that obscenity is one of the issues upon which respondent's refusal to contract is based. Under such an admitted statement of facts, it can hardly be said that a classic example of an 1871 Civil Rights' violation has been pleaded. On the contrary, by such admissions petitioner has pleaded itself out of court. The confession of such facts establishes a prima facie violation of a city ordinance involving sexual conduct in public and an inability to meet the terms of the standard city lease.

The motion to dismiss should have been granted. By admitting a "sexual conduct" violation, it became incumbent upon the petitioner, as a part of his "avoidance" plea to affirmatively allege and establish wherein the principles expressed in *U.S. v O'Brien* 391 U.S. 367, were not applicable and did not support the City's refusal to lease.

There is a difference between the plenary power of local government to suppress "obscene conduct" as malum in se, and the power of government to suppress "obscene materials" involving thought processes. The latter is not plenary and is subject to the "free speech" rights of an individual. The right to proscribe lewd *conduct* stems from the Common Law crime, first recognized as a separate offense in 1688 when Sir Charles Sedley exposed himself in the nude on the balcony of a tavern in Covent Garden, England. 1 Sid. 1688. On the other hand, the separate and distinct offense of "obscene libel" dealing with obscene speech and thought processes (obscene "materials" crime as we know it) was not recognized until 40 years later. *Rex v. Curl* 2 Strange 789 (1727). Both principles were absorbed into our laws by the early American courts. The entire body of legal precedent since that time establishes beyond doubt that the former power, namely; the right of the community to proscribe sexual conduct in public is, and remains, plenary, and is in no way

subservient to any claimed right of an individual to "free speech." Nor did it become so through adoption of the Fourteenth Amendment.

The power being questioned is one of the most basic powers of local government - the power possessed by municipal government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as malum in se. That municipal power is inherent in government itself, and is so basic that its grant of authority is said to be "implied" and to flow from the Common Law, rather than from "express" provisions in the city's charter or the general laws of the State.

The plenary nature of the municipal power to control sexual "conduct" declared malum in se is seen in its purest form in the civil process when the municipal power of safeguarding public morals under valid Sir Charles Sedley statutes is exercised in equity to enjoin the prospective use of obscene conduct.

Every obscene conduct issue should not be escalated into a First Amendment crises in the Federal District Courts - particularly where as here, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to maintain a healthy moral climate and prevent obscene conduct in public.

The legislative history recently reviewed by this court in *Griffin v. Breckenridge* 403 U.S. 88, surrounding the 1871 enactment, indicates that Congress in 1871 never intended that the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a local community seeks, through its representatives, to prevent an individual from "uninating on the balcony of city hall."

POINT I

SOUTHEASTERN PROMOTIONS, LTD. HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COURT HAS ORIGINAL JURISDICTION UNDER THE CIVIL RIGHTS ACT OF 1871.

(A) In Admitting A *Prima Facie* "Nude Conduct" Violation, the Complaint Is Fatally Defective.

The substantive grounds upon which Southeastern Promotions, Ltd. relied in bringing the federal lawsuit is the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983). While Southeastern Promotions, Ltd. also claims federal jurisdiction by virtue of 28 U.S.C. Sec. 1332 (Diversity) and 28 U.S.C. Sec. 2201 and 2202 (Declaratory Judgment), those procedural claims also fail where it is established that federal jurisdiction does not lie under the substantive claim (42 U.S.C. Sec. 1983).

The gist of Southeastern's alleged federal cause of action is a claim in contract for specific performance based upon an alleged federal "civil right" arising out of a First Amendment right to "free speech".[3] In its complaint filed in the Federal District Court, petitioner Southeastern Promotions, Ltd. admitted that nude conduct is present in the production of "Hair" and *affirmatively pleaded* that obscenity is one of the issues upon which respondent's refusal to contract is based. See the Complaint at page 9, reading:

> "The plaintiff alleges upon information and belief that the production of 'Hair' which it seeks to show in the City of Chattanooga *displays very little nudity per se*, and that this show is not obscene within the legal meaning of that term . . . . " (Our emphasis.)

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[3]While Petitioner may be able to establish diversity of citizenship jurisdiction of a civil action having original jurisdiction in a trial court of the State of Tennessee, such was not the action which was pleaded. The allegations are as to unlawful "state action" under the Civil Rights Statute of 1871.

See also petitioner's prayer for declaratory relief (Appendix page 14):

> "2. That the production, as aforesaid, *does not violate any city ordinance* nor is the same subject to the definitions given to the term 'obscenity'." (Our emphasis.)

Under such an admitted statement of facts it can hardly be said that a classic example of an 1871 Civil Rights' violation has been pleaded. On the contrary, petitioner's pleading is essentially one of confession and avoidance and demonstrates that the Complaint is fatally defective. Petitioner is entitled to *no* federal relief under the century old federal statute.

While confessing facts which establish a *prima facie violation* of a city ordinance involving sexual conduct in public (which establishes a *prima facie* inability to meet the conditions of the standard city lease covering such property) Southeastern Promotions, Ltd. nevertheless contends that the Federal District Court should perforce interpret the same as being symbolic speech and declare the City's action in refusing to enter the lease as governmental action which is illegal, and force the City to enter the lease. Although the Tivoli Theater and the Municipal Auditorium are customarily operated by the City in a proprietary capacity and there is no affirmative showing that such theaters are the only ones available for such use in the City of Chattanooga,[4] petitioner nevertheless equates such refusal to lease as being "state action".

[4]This is not a licensing case wherein the city is using its governmental power to prevent the Petitioner from performing "Hair" in the City of Chattanooga unless the promoters remove the alleged lewd conduct (compare Freedman v. Maryland, 380 US 51, 13 L Ed.2d 649, 85 S Ct 734 (Mar. 1, 1965)). Although Petitioner originally alleged on information and belief (Appendix page 12) that there was no other adequate facility, other than the Tivoli Theater, to produce "Hair", that allegation was later contradicted by its Amendment to the Complaint which substituted the Municipal Auditorium for the Tivoli Theater, Respondent denied such allegation (Appendix page 20, at para. 10, and page 21, at para. 11) and Petitioner apparently abandoned that claim, for they introduced no evidence on that claim and the trial judge had no occasion to make a finding on that matter.

The City through the manager of the "Tivoli" took a different view of the factual situation and status of the law and informed Southeastern Promotions, Ltd. that the terms of the lease, *which is customarily used*, by the City in its contracts, require that the lessee must comply with all laws of the United States and of the State of Tennessee and all ordinances of the City of Chattanooga (Appendix page 28); that public nudity has *never* been allowed on the stage of the Auditorium or the Tivoli (Appendix page 48) much less mixed nudity (male and female) of the entire cast (Appendix page 23) and that public nudity was forbidden by Sections 25-28 of the Code of the City of Chattanooga; that Section 6-4 makes it unlawful to conduct any exhibition which was offensive to decency (Appendix page 29); that the nudity and language was discussed and it was determined that the booking should be denied in that it would not be in the best interest of the public (Appendix pages 25, 56).[5]

[5]The facts herein closely resemble the factual situation in P.B.I.C. v. District Attorney of Suffolk County (see Statement of Facts at page 7 and the opinion of the Supreme Judicial Court of Massachusetts at Appendix B to this Brief) which never reached this Court. Being civil in nature and prospective in operation, both cases focused upon *one single* question, namely, the extent of the governmental power to prohibit explicit sexual conduct in public as being contrary to good morals – is it or is it not plenary? Compare the confusion which is reached when the criminal process is used and other issues are injected into the case. P. B. I. C. v. Garrett Byrne, 313 F.Supp. 757 (May 6, 1970) vacated and remanded to consider the question of mootness, in Byrne v. P. B. I. C., Inc., 401 US 987, 28 L Ed 2d 526, 91 S Ct1222 (Mar. 29, 1971). The differing issues presented in the civil and criminal approaches are commented upon more fully in Appendix A to this Brief, also referred to in Moving Party's Motion herein at page 3.

(B) *The Power of Local Government to Proscribe "Sexual Conduct" in Public as Malum in se And Contra Good Morals, is Plenary, And May Not Be Nullified By a Plea of Confession And Avoidance on a General Allegation That the Same is Symbolic Speech. Where the Pleadings Demonstrate on Their Face That Governmental Regulation may be Justified Under Principles Expressed in U.S. v. O'Brien, such General Allegations of Confession And Avoidance do Not State a Claim Upon Which Relief Can be Granted Under 42 U.S.C. Section 1983.*

The state of the pleadings at this juncture was sufficient to establish that, as a matter of law, a substantial federal question regarding a Civil Rights violation based upon "state action" had *not* been stated and a motion to dismiss should have been granted. Unlawful sexual conduct in public does not become speech merely because the actor intended thereby to express an idea. Assuming that the actor does express an idea by the unlawful, sexual conduct, such does not make it "Constitutionally Protected Speech" so as to defeat other more important constitutional interests which are being weighed in the balance. In admitting a "sexual conduct" violation, it became incumbent upon the petitioner, as a part of his "avoidance" plea, to affirmatively allege and establish wherein the principles expressed in the principles expressed in *U.S. v. O'Brien*, 391 US 367, 20 L Ed2d 672, 88 S Ct 1673 (May 27, 1968) had been violated in the City's refusal to lease the City's premises. Compare the numerous "Hair" decisions holding to the contrary and referred to herein at page 10, supra. See, also, the judgment of the trial court below[6] and

[6]While the trial court's judgment was simply that "For the reasons set forth in the memorandum of the Court, the Court is of the opinion that the defendants acted within their lawful discretion in declining to lease the Municipal Auditorium and/or the Tivoli Theater unto the plaintiff . . . ." and while the memorandum of the Court indicates that Respondent's Motion to Dismiss was denied because the Amended Complaint raised questions of fact which required a trial, see 341 F.Supp. 465, at 470:

> "The third ground in the defendants' motion to dismiss, namely that the theatrical production for which a lease is sought by the plaintiff would violate both ordinances of the City of Chattanooga and laws of the State of Tennessee relating to both public nudity and obscenity, raises issues of both fact and law which can only be decided after a trial on the merits of these contentions. These matters will accordingly be considered in the portion of this opinion dealing with the trial of the cause on its merits. . . . "

Amicus submits that such dismissal should have been granted on the grounds that the pleadings, as amended, did not state a claim upon which relief could be granted. Where, as here, the pleadings on their face show a prima facie violation of a "Sir Charles Sedley's" statute regarding "sexual conduct" in public, any civil rights claim based upon a denial of free speech arising out of the construction of the statute as applied should be dismissed where the petitioner fails to allege sufficient facts which place in issue the Government's good faith reliance upon the principles expressed in U.S. v. O'Brien, supra. Compare Bell v. Hood 327 US 678, 90 L Ed 2d 939, 66 S Ct 773, 13 A LR 2d 383.

the concurring opinion of Circuit Court of Appeal Judge Weick (supra, at page 21).

Amicus submits that the eagerness of federal courts to sustain 42 U.S.C. Section 1983 jurisdiction in the above "Hair" cases demonstrates the mischief-making quality of the narrow-minded approach of those courts to this type of case, that is, a failure to recognize and pay proper deference to the difference between the plenary power of local government to suppress "obscene conduct" as *malum in se*, and the power of government to suppress "obscene materials" involving thought processes, which latter power is not plenary and which is subject to the "free speech" rights of an individual. This distinction was first noted by Justice Douglas in his dissent in two criminal cases involving "obscene materials" and the latter power. Roth-Alberts, 354 US 476 at 512, 1 L Ed 2d 1498, 72 S Ct 1304 (June 24, 1957):

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual mis-

conduct . . . ." (Our emphasis.)

Amicus submits that a proper perspective of the limits of each of the two powers can only be had by examining the origin, and tracing the historical development and limitation of each under the law.

The right to proscribe lewd *conduct* stems from the Common Law Crime, first recognized as a separate offense in 1688 when Sir Charles Sedley was brought before the common law courts on a breach of the peace charge for "exposing" himself in the nude on the balcony of a tavern in Covent Garden, England, 1 Sid 1688. Common law crimes rested upon general reception and usage and were established by showing that it always had been the custom in the community to observe the *standard of conduct* which had been violated. On that occasion, Sedley urinated onto the courtyard below and delivered an obscene and blasphemous speech. In that case, the common law courts declared Sedley's *conduct* to be a common law crime – the origin of the common law of Tennessee on indecent exposure, pleaded by respondents in the motion to dismiss[7] (Appendix page 15).

On the other hand, the separate and distinct offense of "obscene libel", dealing with obscene speech and thought processes (obscene "materials" crime as we know it) however, was not recognized until 40 years later. *Rex v. Curl*, 2 Strange 789 (1727). At that time the English novel had come into being and that and other writings were becoming pornographic. To meet that social problem, the House of Lords in 1727, in a case involving the distribution of an obscene *publication* by a printer named Curl, drew an anology to the law regarding "conduct" laid down in Sedley's case and held this also to be a common law crime – the so-called "obscene libel".

When the founding fathers settled in America shortly thereafter, they brought with them the Common Law of England, including both the law against lewd "conduct" and the

[7]Amicus has no difficulty in seeing a parallel in the conduct of Sir Charles Sedley (one of the REstoration rakes) and the lewd conduct which is interwoven into "Hair". The only difference is that "Hair" chose to illuminate the same with a spotlight.

law against obscene "publications". These principles were immediately absorbed into our laws through recognition by the early American courts and were later codified in the laws of Congress and each of the states of the Union. Based upon Judaeo-Christian norms and designed for the protection of the family structure, both of these laws have governed this Nation for close to 200 years.

The entire body of legal precedent since that time establishes beyong doubt that the former power, that is, *the right of the community to proscribe sexual conduct in public is, and remains plenary and is in no way subservient to any claimed right of an individual to "free speech"*, as petitioner herein argues did occur under the Civil Rights Act enacted in 1871. In point of fact, until the adoption of the Fourteenth Amendment in 1868, there was no basis whatsoever for voicing such a claim.

There can be no doubt but that if the City of Chattanooga in 1860 had denied the use of both the Tivoli and the Municipal Auditorium to the promoters of "Hair" on the grounds that the nudity and other lewd conduct portrayed therein violated the public indecency laws, the exercise of that municipal power could not have been questioned by any assertion of a First Amendment "free speech" claim. *Barrow v. The Mayor and City Council of Baltimore*, 7 Pet. 243, 8 L Ed 672 (1833). The rationale which required that result is elementary. The power under question is one of the most basic powers of local government – the power possessed by municipal government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as being *malum in se*. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H. G. Wood §23 and 24 at pages 45-46:

> §23. Acts affecting public morals, public nuisances per se, when. – There are classes or kinds of business which are nuisances per se, and the very fact that they are carried on in a public place is *prima facie* sufficient to establish the the offense. But in such cases, if the respondent questions

that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances *per se*, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. *This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency.*

§24. Wrongs malum in se. -- *This class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind comdemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance.* (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law rather than from "express" provisions in the City's Charter or the General Laws of the State. See The Law of Nuisances, Woods, §743, at page 972:

§743. No control over nuisances without special power. -- Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. *There can be no question, however, but that, where a nuisance exists within its corporate limits that is clearly a nuisance at common law* or by statute, which is detrimental to the health of the inhabitants, *it may be abated by the authorities, but it must be a nuisance at common law* and one which any person injured thereby might lawfully

abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is is clearly a nuisance, and one which affects the *health* of the city, the abatement may be made bv the authorities or by any person injured thereby. *The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated.* (Our emphasis.)

Joyce, in his treatise "Law of Nuisance" §345 notes that this common law power entrusts the municipal corporation with not only the right but the obligation to remove the nuisance, at page 498:

"The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution."

The importance of this municipal power was stressed by this Court in *James Phalen v. The Commonwealth of Virginia*, ___ US ___, 12 L Ed 1030, 1033, ___ S Ct ___ (_____ , 1850):

"The suppression of nuisances injurious to public health or morality is among the most important duties of government . . . ."

"It is a principle of the common law, that the king cannot sanction a nuisance . . . ."

Since this power of local municipal government has ever been regarded as being of utmost importance and *most certainly was one which was not limited by the First Amendment prior to the adoption of the Fourteenth Amendment in 1868,*

it is illogical and unwarranted to say that that situation was changed with the adoption of the Fourteenth Amendment in 1868, or with the enactment of the Civil Rights Act three years later in 1871. While it is true under the incorporation principle that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress", *Palko v. Connecticut*, 302 US 319, 58 S Ct 149, 82 L Ed 288 (1937), there is absolutely nothing in the historical facts surrounding those events which would lend any credence to the argument that this plenary right of municipal government, to prohibit lewd *conduct* by either criminal or civil sanctions, so highly praised by this Court in *Phalan v. Commonwealth of Virginia, supra*, in 1850, was to be disturbed in the slightest.

The plenary nature of the municipal power to control sexual "conduct" declared *malum in se* is seen *in its clearest form* in the *civil* process when the municipal power of safeguarding public morals under valid Sir Charles Sedley statutes is exercised in equity to enjoin the *prospective* use of obscene conduct. Confession and avoidance is not a defense to a legitimate exercise of municipal power under the Sir Charles Sedley statutes. It is no defense against the exercise of a municipal government's plenary powers to safeguard public morals and abate moral nuisance to confess that the illegal conduct which is about to be portrayed in public is a violation of common law "conduct" statutes yet seek to avoid the exercise of that local municipal power to abate the same by asserting a claim that such is protected because it is interwoven with a free speech right. See *P.B.I. C. Inc.et. al. v. Dist. Atty. of Suffolk County*. 258 N.E 2d 82 (April 9, 1970) a copy of which appears at Appendix B to this Brief.

Under petitioner's theory, it is difficult to imagine any "state action" against obscene conduct which may not be pleaded as the basis of a "due process" claim in the Federal District Court under 42 U.S.C. Sec. 1983. For example, on a broader scale than "Hair", but equally in point, would not the City, under its broad historical powers to protect public morality in the local community, possess the governmental

right to enact an ordinance that one may not exhibit a film commercially which depicts an explicit act of oral sodomy, and enjoy the concomitant right to enforce such specific prohibition against offending films, such as "Deep Throat", in a state court action under principles expressed by this Court in *U. S. v. O'Brien, supra* . . . or is local government doomed in each instance to be relegated to a prolonged and costly trial of a 1983 cause in a Federal District Court with the primary issue being whether the explicit sexual conduct (expressly prohibited under the police power) is "excused" under the "taken as a whole" formula of *Miller v. California?*[*] To apply the latter proposition to the conduct in "Hair" and "Deep Throat" would, historically speaking, emasculate the common law principle upon which Sir Charles Sedley was arrested in 1688 when he "urinated" and "exposed" himself on the balcony of Covent Garden, England for, in a historical sense, it could be argued that Sedley was just a rebel "speaking" against the morals of his time. Can it be claimed that, under 42 U.S.C. Sec. 1983, Sedley should be entitled to a federal declaratory judgment against the City on the grounds that he had a civil right and intended to continue such conduct nightly, while out on bail, as a form of "symbolic speech" against the contemporary mores? Similarly, under *Steffel v. Thompson*, ___ US ___ 39 L Ed 2d 505, ___ S Ct ___ (March 19, 1973) would one of Sedley's drinking partners, who refrained momentarily, have been entitled to a declaratory judgment against the City that his conduct was free speech, or that the breach of the peace charge would be unconstitutional if applied to him in the future?

Every obscene conduct issue should not be escalated into a First Amendment crisis in the Federal District Courts – particularly where, as here, an important governmental interest is being furthered and local government is attempting to discharge its historic responsibility to the community to

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[*]See Appendix A to this Brief, being pages 33 to 39 of the Brief, Amicus Curiae of C. H. Keating, Jr. in support of Appellees in Jenkins v. Georgia, No. 73-557, which is referred to herein at page 4 of the Motion of Amicus Curiae.

maintain a healthy moral climate and prevent obscene conduct in public. It is a mistake for this Court to blithely extend federal jurisdiction to every claim made by a "Sir Charles Sedley". See *Rex v. Sedley*, 1 Sid. 168. Circuit Judge Weick said as much in his concurring opinion in 486 F.2d 898:

> "The auditorium involved in this case belonged to the City, which is a political subdivision of the state. It was constructed with taxpayers' money. It goes without saying that the city fathers could not be compelled to rent the auditorium to a person who desired to operate therein a house of ill fame, in violation of state law. Yet the conduct exhibited by the film in the present case is even worse as it portrays obscene sexual acts which could be committed only by depraved persons.
>
> "Our case involves only the question whether a Federal Court has any right to order the state to permit the exhibition for profit of filthy, obscene, sexual material on state property. Federal Courts ought not take over the operation of state facilities.
>
> "In *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L.Ed.2d 342 (1972), the court upheld the right of the state to prohibit the exhibition of obscene material in a private saloon. Here, we are dealing, not with private property, but with public property and with police power of the state.
>
> "As pointed out in LaRue, the First Amendment protects 'expression', not 'action'. Our case involves only depraved sexual action.
>
> "We would doubt that a Federal Court would ever attempt to compel the Federal Government to rent its property for any such immoral purpose. It is also inconceivable that a Federal Court would order such an exhibition to be held in the Eisenhower Theater located in the John F. Kennedy Center for the Performing Arts at the Capitol. State facilities should be treated with the same respect as federal facilities.
>
> "No one has a constitutional right to exhibit obscene sexual acts in public buildings."

C. The Congressional Purpose in Passing the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983 and 1985) Was to Prevent Racial Discrimination. It Was Never the Intent of Congress at That Time That Those Sections Should be Interpreted to Authorize Interference With the Common Law Powers of Local Municipal Governments to Declare What Constitutes And to Prevent Moral Public Nuisances in the Form of Lewd Public Conduct.

Amicus submits that the legislative history recently reviewed by this Court in *Griffen v. Breckenridge*, 403 US 88, 29 L Ed 2d 338, 91 S Ct 1790 (June 7, 1971) surrounding the 1871 enactment, indicates that Congress in 1871 never intended that the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a local community seeks, through its representatives, to prevent an individual from "urinating on the balcony of city hall". To recognize in the face of such lewd conduct a cognizable First Amendment "free speech" claim is to forget that our constitutional right of the community to control public morality has its historical roots in the Common Law (1688) and not in the judicial legislation of the 1940's when certain Justices on this Court (Justice Douglas, et al.) opted to expand the boundaries of the "state action" concept of an 1871 Act of Congress.

On the basic issue of whether Southeastern Promotions, Ltd. has stated a federal cause of action under 42 U.S.C. Sec. 1983, this Court cannot avoid the implication of the rationale expressed by it in *Griffen v. Breckenridge*, *supra*, that the Civil Rights Act of 1871 requires an animus of racial bias or class based invidious discrimination. In *Griffen*, Justice Stewart was required to examine the congressional purpose behind the Civil Rights Act of 1871 (as it related to (1) the meaning, and (2) the scope of 42 U.S.C. Sec. 1983(3) the conspiracy crime). Specifically, the Court was faced with the question of whether, in the context of a racial controversy, Section 1985 (3) embraced a conspiracy crime of private individuals. The decision rendered as to its "meaning", i.e., that the 1871 legislation was intended to create a conspiracy crime to cover

private action by individuals was based upon two factors: (1) The plain language of 42 U.S.C. Sec. 1985, and (2) the statutory scheme of the 1871 Civil Rights action taken as a whole (42 U.S.C. Secs. 1983 and 1985). The further question as to its scope was based upon a third factor: (3) The legislative history in 1871 of the Civil Rights legislation.

The decision relating to "meaning," (i.e., *not* to read the Section 1983 phrase of "under color of state law" into 42 U.S.C. Sec. 1985(3)) was based upon statutory construction and the requirement that both sections, 1983 and 1985, must be read together and construed as a whole. Reading the two sections together, the Court concluded that to read the "under color of state law" phrase of 1983 into Section 1985 would duplicate the "under color of state law" conspiracy crime already present in 42 U.S.C. Sec. 1983 and would be unreasonable.

Having found a legislative intent to create a conspiracy crime of individuals under 42 U.S.C. Sec. 1985, the Court was then faced with a further question as to its "scope" and the prospect that such section might be regarded as a broad general federal tort law. To avoid that result, Justice Stewart examined the legislative arguments which took place at the time of the passage of the 1871 legislation and concluded therefrom that the legislative intent in adopting such language was that there must also be some racial, or perhaps otherwise class based invidiously discriminatory animus for a conspiracy action of individuals to lie under 42 U.S.C. Sec. 1985.

What this Court failed to consider, however, is that the same logic should then apply in reverse. Since it was never the intention of Section 1985 to reach other than "racial, or perhaps otherwise class based invidiously discriminatory animus" and since under the first step in its *Griffen* reasoning, Sections 1985 and 1983 must be read together as a whole, then it was equally necessary to apply the "racial or class based invidiously discriminatory animus" restriction to Section 1983. In sum total, under *Griffen*, the judicial legislation of the 1940's which expanded the boundaries of the "state action" concept of the 1871 Act of Congress was ill-conceived as beyond the intent of the legislators.

The irrational state of the present interpretation of the Civil Rights Act of 1871, which has not since been amended, is brought into clear focus by the peculiar factual situation in a recent Civil Rights action now pending in a Federal District Court in the Central District of California, *Vincent Miranda, dba Walnut Properties and Pussycat Theatre, Hollywood vs Donna Bagley et al* No. 73-195-H.P. In that situation, a porno theater was located within the area of a city being considered for redevelopment. It was alleged in that Civil Rights action that during the hearings on redevelopment, one of the defendants, a private citizen and the foe of the porno theater, suggested at a public hearing that one of the benefits of the redevelopment plan would be that the city would be rid of the porno theater. Thereafter, the city had occasion to informally look into the prospect of acquiring the property for a civic art theater. Much later the redevelopment plan was defeated. When the theater commenced showing hard-core pornographic films, like "Deep Throat", and the city took law enforcement action against the same under the state obscenity statutes, the theater owner filed a 2-count federal civil rights action in the Federal District Court against the city and the private citizen who was reported to have advocated the use of the eminent domain power for redevelopment as a means of getting rid of the porno theater. The first cause of action against the private citizen and city council members was conspiracy to violate 42 U.S.C. Sec. 1983. The second cause of action against the private citizen and city council members *on the same facts* was conspiracy to violate 42 U.S.C. Sec. 1985(3). On demurrer to the complaint, the trial court conceded that the 1985 (3) action must be dismissed on the grounds of *Griffen* for failure to allege racial bias or class based invidiously discriminatory animus, but would not dismiss the conspiracy action against the private citizen based upon Section 1983 - - a result which flies in the fact of the legislative intent of the 1871 Act as discussed by Justice Stewart in *Griffen*.

CONCLUSION

A municipality's plenary power to apply lewd conduct laws against a *prima facie* violation within its boundary, is not subject to collateral attack in a civil rights action in the federal courts, brought pursuant to 42 USC section 1983. Further, the federal district court should dismiss such a lawsuit on the grounds of failure to state a claim upon which relief can be granted, where the federal pleadings fail to affirmatively allege the specific facts which prevent the municipality from relying upon the principles of law expressed in *U.S. v. O'Brien, supra.*

The judgment of the trial court dismissing the lawsuit should be affirmed on the grounds of failure to state a claim upon which relief can be granted, or on the alternative ground relied upon by the trial judge, namely; that the City officials acted within their lawful discretion under the law expressed in *U.S. v. O'Brien, supra,* when they applied the lewd conduct laws independently to the conduct which was to be engaged in during the public performance of "Hair".

Respectfully submitted,

_____

Charles H. Keating Jr.
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day of October, 1974, copies of the within Amicus Curiae Brief were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Eugene N. Collins (3 copies)
Randall L. Nelson
400 Pioneer Bldg.
Chattanooga, Tenn. 37402

Gerald A. Berlin (1 copy)
73 Tremont Street
Boston, Mass. 02108

Henry P. Monaghan (1 copy)
10 Post Office Square
Boston, Mass. 02109

John Alley (1 copy)
4845 Hixon Pike
Hixon, Tenn. 37343

_____

Attorney for Amicus Curiae

Appendix A

Pages 33-39 of Brief Amicus Curiae of
C. H. Keating Jr. in Support of Appellee
in *Jenkins v Georgia* No. 73-557 ..... A3 thru A9

A: The Problem of Applying Civil and Criminal Sanctions to Lewd Conduct in Motion Picture Films.

The communication media is plagued at the present time with an avalanche of lewd displays and language which, if engaged in off-stage or off-screen and in public, would be subject to criminal penalties as improper public conduct. It beggars logic to say that an act of sodomy or perversion is punishable as a felony,[16A] and at the same time hold that a 2 1/2 minute pictorial display of sodomy on an enlarged motion picture screen, albeit simulated, to a public audience, as a part of commercial entertainment. (See Appen. A at pages A78 -A84 and Appen. B at pages B24-B27) may not be reached by legal sanctions, both civil and criminal. Further, it is equally as illogical to say, on the one hand, that such conduct may be reached by civil sanctions, see *Evans Theatre Corporation v. Slaton*, 227 Ga 377, 180 SE 2 712, cert denied in *Evans Theatre Corp. v. Slaton*, 404 US 950, 30 L.Ed. 2, 267, 92 S. Ct. 281. (Nov. 9, 1971), yet may not be reached by criminal

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[16A] See Stone v. Wainwright U.S. , 50 L.Ed. 2d 179, S.Ct. (Nov. 5, 1973) discussed at Footnote 24, infra.

Which is more devastating to society. . . a 2-1/2 minute scene of simulated oral sodomy projected on a public screen of a neighborhood theaer to a packed audience of 17 year olds and older, or several acts of explicit oral sodomy (e. g. Deep Throat) projected on a public screen in a porno theater, located on run-down Main Street or in a local neighborhood? Does any member of this Court have the right to draw such a distinction? See Judge Learned Hand's views at footnote 36, and the views of the Georgia Supreme Court in Evans Theater Corp. v. Slaton, supra, quoted at page 13, supra. Further, does the state of the public morals of this nation in 1974 support the thesis of Justices Brennen, Stewart, Marshall, and Douglas which underlies their dissenting opinions in Miller v. California, et al, supra, that we, as a nation, can withstand the assault such a distinction would encourage. See footnote 24 infra.

sanctions. . . or, that it may be reached by criminal sanctions, but only when examined, not as to conduct but, in accordance with the test for "obscene material" established by this Court in *Miller v. California, supra.*

It would appear that, unless there is *now* a different explanation in our jurisprudence, that is exactly what Justice Douglas was willing to admit to, in his 1957 dissent, in reviewing two criminal cases in Roth-Alberts, 354 US 476, at 512, 1 L.Ed. 2 1498, 77 S.Ct 1304 (June 24, 1957:

> "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the ground of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct. . . ." (Ouremphasis.)

Analytically, there are two separate problems presented here, each of which deserves a separate analysis. The first is the question raised on the civil side of the issue, as it pertains to the right of government to enjoin the public exhibition of explicit sexual conduct based upon a stated public policy, either judicially determined or legislatively determined. The second is the question raised on the criminal side of the same issue, as it pertains to the right of government to impose criminal sanctions upon those persons who, for whatever reason, elect to engage in conduct which contravenes the public policy which forbids such public displays.

Even though the statute under attack herein is a criminal statute imposing criminal sanctions, and the case under review is an appeal from a criminal conviction arising out of the application of that criminal statute to specific subject matter, still, the attention of this Court would be misguided were it to undertake an analysis of the criminal statute or its application in a given circumstance, without, at the outset examining, and bringing into focus the extent of the governmental power which exists under the *civil* remedy where lewd conduct is involved. That is essential, in order that side considerations which appear upon an analysis of the criminal sanctions, such as "fair notice", "mens rea", and "scienter" considerations,

etc., may not cloud and obfuscate the broad reach of the governmental policy against public lewdness.

B. A State's Power to Apply Civil Sanctions to Lewd Conduct on Films Has No Limitations such as Those Stated in Miller v. Calif., as to Obscene Materials.

The caveat which Amicus seeks to articulate can best be brought into focus by an illustration which takes into account the subject matter "Carnal Knowledge" and the surrounding historical facts when, in Jan. and Feb. of 1972, the case was prosecuted in Albany, Georgia. Suppose, for example, that the Dougherty County District Attorney had not been frustrated by the shrewd defense tactics of Billy Jenkins' lawyer, who removed the Dougherty County Superior Court civil action *Robert Reynolds, District Attorney v. S.W.J., Inc.*, C.A. No. 7296, to the Federal District Court. (See Statement of Facts, at Point B2 on pages 16-17), and had been able to try the basic issue as to "Carnal Knowledge" on the *civil* injunction side of the Georgia Courts, as was done in the "I Am Curious (Yellow)" case in Atlanta, Georgia? Amicus submits that, in that case, the focus would have been sharpened so that no one could have misread the real issue, not even the three justices who dissented in Jenkins v. Georgia, supra, in the Georgia Supreme Court below.[17] The issue there, very

[17] It was for this very reason that the Atlanta, Georgia, law enforcement effort in 1971 was pointed in the direction of the civil remedy and the forfeiture penalty, rather than at the criminal sanctions. (See page 11, supra) Compare the opinion of the Georgia Supreme Court in the "I Am Curious (Yellow)" case, Evans Theater Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712, Mar. 4, 1971. In the criminal area, one is inclined to confuse the issues by reasoning along "dominant theme" lines, which assumes, erroneously, that the proscribed sexual conduct, which is specifically defined is acceptable so long as it is an "integrated" part of the theme. Amicus submits that the correct rule of law was stated in Trans-Lux Distributing Corp. v. Board of Regents, 248 NYS 2d 857 (Mar. 26, 1964):

> "If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition." Only when this misapprehension is corrected by a directive from this Court, will it be possible for law enforcement to assure that films like "Deep Throat" will have a very short run.

simply, would have been "Is the artist such a favorite of the law that, in plying his craft, he may exhibit to a public audience on an enlarged motion picture screen for public entertainment, an acted-out version of simulated oral sodomy, engaged in by "beautiful" Hollywood actors to the accompaniment of pleasant surroundings and inviting musical sounds? – in the face of an overriding public policy to the contrary, clearly articulated [18] by all three elements of government (See "Statutory Background" at Points A, 2, 3, and 4, supra at pages 10-15).

Certainly the problem is more easily understood where the only issue is "May the State enjoin such live conduct?" or, may the state enjoin such filmed portrayals of explicit "sexual conduct?" or, "May the State declare a forfeiture of the property interest in the product which embodies the lewd portrayals" or, "May the state declare a forfeiture of the profits from the commercial public exhibitions of such subject matter?" It seems to Amicus that, on this fundamental issue, Associate Judge Burke of the New York Court of Appeals was

[18] In the light of subsequent events (i.e., the chaotic retreat of Justice Brennan in Paris Adult Theatre I v. Slaton, 413 US 49, 37 L.Ed.2d 446, at 467-491, 93 S Ct 2628 (June 21, 1973) was not Justice Brennan (in voting to override the "articulated" public policy of the States of Florida and Massachusetts) one of the principal actors in a "reverse" censorship movement in Grove Press, Inc. v Gerstein, 378 US 577, 12 L.Ed2d 1035, 84 S Ct 1909 (June 22, 1964) and Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 US 413, 415, 16 L.Ed.2d 1, 3, 86 S Ct 975 (Mar. 21, 1966)? Compare Justice White's position in his dissent in Grove Press, Inc., v. Gerstein, supra, and in Memoirs, supra, at 461:

> "Nor does it mean that if books, like Fanny Hill are unprotected, their non prurient appeal is necessarily lost to the world. Literary style, history, teachings about sex, character description (even of a prostitute) or moral lessons need not come wrapped in such packages. The fact that they do impeaches their claims to immunity from legislative censure. . . ."
>
> "Finally, it should be remembered that if the publication and sale of Fanny Hill and like books are proscribed, it is not the the Constitution that imposes the ban. Censure stems from a legislative act, and legislatures are constitutionally free to embrace such books whenever they wish to do so. But if a State insists on treating Fanny Hill as obscene and forbidding its sale, the First Amendment does not prevent it from doing so. . . ."
>
> "I would affirm the judgment below." (Our emphasis.)

plainly correct when he stated in his majority opinion in *Trans Lux Distributing Corp. v. Board of Regents*, supra, at 863:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privileged to bend morals, policy and law to its internal craft standards, then neither should producers of films."

Where civil sanctions are being "fair notice" is not an issue. A final and complete resolution of the civil lawsuit does not depend upon the litigatious issue as to whether "sexual conduct" is "specifically defined" by applicable state law, *Miller v. California*, 413 US 15, 37 L.Ed.2 419, 431, 93 S.Ct. 2607. Since the Court's injunction is prospective in nature, no "expost facto" side issue is presented. See *State of Ohio ex rel Keating v. A Motion Picture Film Entitled Vixen*, 272 N.E.2d 137, 141, 27 Ohio St.2d 278 (July 21, 1971) as adhered to on remand in *State ex rel Keating v. Vixen*, 37 Ohio St.2d 215, 301 N.E.2d 880, (Sept. 26, 1973):

> "Since the real issue before this Court is whether the injunction should be dissolved, or combined in force and effect, RC § § 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below. . .
>
> It follows that we have authority to render such judgment as the Ohio Court would now be required to render, if the cause were remanded. Such authority is specifically given in Section 2(B) (1) (f), Art. IV Ohio Constitution."

In Amicus' view the authorities which have considered the civil issue, as thus isolated, have made a resolution of that single issue quite simple. Those authorities start with Justice Tom Clark concurring in *Kingsley International Pictures Corp. v. Regents*, 360 US 684, 702, 3 L.Ed2, 1512, 1524, 79 S.Ct. 1362 (June 29, 1959):

"It may be, as Chief Judge Conway said, "that our public morality, possibly more than ever before, needs every protection government can give." 4 N.Y.S.2d at 363, 151 N.E.2d 204, 205, 175 N.Y.S.2d at 50. And, as my Brother Harlan points out, "each time such a statute is struck down, the State is left in more confusion." This is true where broad grounds are employed leaving no indication as to what may be necessary to meet the requirement of due process. *I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion, or lewdness."* (Our emphasis)

See also Justice Burke speaking in *Trans Lux Distributing Corp. V. Board of Regents*, 248 N.Y.S.2d 857, 858-864 (Mar. 15, 1965):

"If simulated sexual intercourse outrages public decency, it does so as such and not only when the sole or dominant subject of any given exhibition. The licensing statute contemplates the deletion of such material. It may either be omitted entirely or the producer may redo the scene another way. *If it is objected that the enterprise is artistically not worth doing without the scene as it stands, this is the problem not of the law, but of the producer who has made a pornographic scene so central to his work. . ."* (Our emphasis)

The Per Curian opinion of the Ohio Supreme Court voiced the same sentiment in *State of Ohio ex rel Keating v. "Vixen"*, 27 Ohio St.2d 278, 272 N.E.2 137 at 140 (July 21, 1971) as adhered to on remand in *State of Ohio ex rel Keating v. "Vixen"*, 37 Ohio St.2d 215, 301 N.E.2d 888, (Sept. 26, 1973):

"Assume, hypothetically, that the main character in "The Sound of Music" performs, during one scene, an act of sexual lewdness, could we permit that part of the film to go unregulated merely because the producer had an "eye on the recent Supreme Court ruling?" The question supplies its own answer. . ."

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse. . . "(Our emphasis)

That is exactly the conclusion reached by the Georgia Supreme Court on the civil aspect of this philosophical controversy. See *Evans Theatre Corp. v. Slaton*, 227 Ga 377, 180 S.E.2d 712, where the Georgia Supreme Court held at page 715:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga.L.1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. *There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.* (Our emphasis)

Appendix B

Opinion of Supreme Judicial Council of
Massachusetts in P.B.I.C. Inc. v.
District Attorney of Suffolk County,
258 N.E.2d 82 ..... B3 thru B4

P. B. I. C., INC. et al.

v.

DISTRICT ATTORNEY OF SUFFOLK COUNTY.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 27, 1970.

Decided April 9, 1970.

Injunctive relief was sought against prosecution. The case was reserved and reported without decision by the Supreme Judicial Court for the County of Suffolk, Cutter, J. The Supreme Judicial Court held that injunctive relief was given against prosecution of producers and members of cast of musical play for violation of statute relating to open and gross lewdness and statute relating to obscene entertainments conditioned on excision forthwith of specified lewd features including requirement that each member of cast be clothed to a reasonable extent at all times and the complete elimination of all simulation of sexual intercourse or deviation.

Ordered accordingly.

1. Injunction ⇐85(2), 105(1)

Discretionary equitable jurisdiction exists to restrain enforcement of an unconstitutional criminal statute or unconstitutional application of a valid statute.

2. Injunction ⇐189

Injunctive relief against prosecution of producers and members of cast of musical play for violation of statute relating to open and gross lewdness and statute relating to obscene entertainments was given conditioned on excision forthwith of specified lewd features including requirement that each member of cast be clothed to a reasonable extent at all times and the complete elimination of all simulation of sexual intercourse or deviation. M.G.L.A. c. 272 §§ 16, 32.

Gerald A. Berlin, Harold Katz, Henry P. Monaghan, Boston, and Alan M. Dershowitz, Cambridge, for P. B. I. C., Inc.

Gael Mahony and Richard C. Minzner, Boston, for the Trustees of the Jujamcyn Theatres and another.

Garrett H. Byrne, Dist. Atty., Joseph R. Nolan, Asst. Dist. Atty., Alvin Brody and John M. Lynch, III, Boston, for respondent.

Before WILKINS, C. J., and SPALDING, CUTTER, REARDON and QUIRICO, JJ.

RESCRIPT.

[1, 2] In this case, reserved and reported without decision by a single justice, injunctive relief is sought against prosecution of the producers and members of the cast of a performance called "Hair," for violation of G.L. c. 272 §§ 16 and 32. Declaration is sought that prosecution would contravene various constitutional provisions. Each justice participating has seen the performance at the request of the parties. One scene shows members of the cast in the nude facing the audience. One nude male performer is bathed on stage. There is incidental stage action which a jury could conclude was clowning intended to simulate sexual intercourse or deviation. This appears to be less realistic than the conduct discussed in People v. Bercowitz, 308 N.Y.S.2d 1 (Cr.Ct.N.Y.). The play in various respects will be offensive to some persons. It constitutes, however, in some degree, an obscure form of protest protected under the First Amendment. Viewed apart from the specific incidents mentioned above, it is not lewd and lascivious, whatever other objections there may be to it. The incidents, already mentioned are separable from, and wholly unnecessary to, whatever theme this

noisy, disorganized performance may have. Discretionary equitable jurisdiction, infrequently exercised, exists to restrain enforcement of an unconstitutional criminal statute or unconstitutional application of a valid statute. See Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 188, 23 N.E.2d 133; Kenyon v. Chicopee, 320 Mass. 528, 531, 535, 70 N.E.2d 241. Reasonable doubts are asserted whether the statutes cited have application to dramatic performances (cf. Re Giammi, 69 Cal.2d 563, 570–577, 72 Cal. Rptr. 655, 446 P.2d 535), and whether, if so applied, these statutes may be unconstitutionally vague. See Alegata v. Commonwealth, 353 Mass. 287, 293, 231 N.E.2d 201. Injunctive relief will be given, but, by analogy to the principle that he who seeks equity must do equity, the injunction, to be framed in the county court, shall be conditioned upon excision forthwith of the specified lewd features so as (a) to have each member of the cast clothed to a reasonable extent at all times, and (b) to eliminate completely all simulation of sexual intercourse or deviation. Nothing in this opinion or any injunction is to preclude prosecution for any misuse of the national flag, a matter not argued to us.

So ordered.